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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GEORGE W. BUSH, Governor of Texas, *et al.*,
Appellants,
vs.
AL VERA, *et al.*,
Appellees.

REV. WILLIAM LAWSON *et al.*,
Appellants,
and
ROBERT REYES, *et al.*,
Appellants,
vs.
AL VERA, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellants,
vs.
AL VERA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

When redistricting in 1991, Texas had the ability to ensure minorities full, fair, and equal participation in the political process and the opportunity to elect their candidates of choice by drawing compact districts consistent with Texas political tradition and with the Constitution. Instead, Texas chose to give paramount weight to creating three "safe" single-race majority-minority districts and subordinated traditional districting principles to that objective. The questions presented are:

1. Whether voters living in, or in districts adjacent to, bizarrely shaped, single-race majority-minority districts who have consequently suffered serious representational and other harms have standing to challenge the constitutionality of such districts?

2. Whether the lower court was clearly erroneous in determining that the direct and circumstantial evidence established that Texas was predominantly motivated by racial considerations in formulating Congressional Districts ("CDs") 18, 29, and 30, and their contiguous districts, thus triggering strict scrutiny?

3. Whether Texas can overcome a determination of predominant racial motivation by showing that the final shapes of the districts at issue also were influenced by political gerrymandering that affected the contours of, but did not imperil the preordained racial character of, the districts?

4. Whether Texas had a compelling state interest to engage in race-based districting, particularly where there has been no showing that the lines drawn for CDs 18, 29, and 30 were required by the Voting Rights Act or were otherwise necessary to remedy past racial discrimination?

5. Whether Texas employed narrowly tailored means when it racially gerrymandered CDs 18, 29, and 30 by splitting hundreds of precincts, grossly departing from traditional districting principles, and rejecting many more compact, less bizarre alternatives?

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BRIEF ON THE MERITS

OPINION BELOW

Appellees respectfully urge that the Court affirm the judgment below invalidating portions of Texas House Bill 1 [hereinafter HB 1], 72nd Tex. Leg., 2d C.S. (Aug. 29, 1991). A unanimous three-judge panel found that Texas unconstitutionally separated voters by race in creating Congressional Districts ("CDs") 18, 29, and 30. *See Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994).

STATEMENT OF THE CASE

Texas was apportioned three additional congressional districts as a result of the substantial increase in Texas's population between 1980 and 1990. From the outset, as Texas later reported to the Justice Department, "it was agreed that the new districts should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives." *Narrative of Voting Rights Act Considerations in Affected Districts* (Sept. 1991) Pl. Ex. 4C, J.A. 104 [hereinafter *Narrative*]. Any proposal that did not meet this *a priori* goal was discarded:

> There were many alternative proposals presented. Although some of these proposals showed a more compact configuration, none of them reached the threshold 50% total [minority] population . . . .

Id., J.A. 106. To accomplish this objective, Texas "tortuously constructed [CDs 18, 29, and 30] block-by-block and from one side of the street to another across entire counties to satisfy the desired racial goal." *Vera*, 861 F. Supp. at 1345.

While incumbents may have had a chance to influence some of the district boundaries, their interests were always subordinated to the primary goal of "providing 'safe' seats in Congress for two African-American [representatives] and an Hispanic representative[]." *Id.* at 1309. Removing minority voters from one of the proposed minority districts was allowed only if minorities from other districts who were more likely to vote were "captured" to

preserve the racial character of the single-race majority district. The result was three districts created in "utter disregard for traditional redistricting criteria and [whose] shapes are ultimately unexplainable on grounds other than the racial quotas"; these districts are unquestionably "the product of unconstitutional racial gerrymandering." *Id.* at 1341.

A. BACKGROUND OF PLAINTIFFS' CHALLENGE TO TEXAS'S CONGRESSIONAL REDISTRICTING PLAN

"In assessing the redistricting plans adopted by the Texas legislature in 1991, it is important to take note of the political climate in which those plans were adopted." *Minority Voting Rights Analysis for the Texas House of Representatives 1991 Redistricting Plan* 1 (July - Sept. 1991) ("*Minority Analysis*").[1] Texas today is a multi-ethnic community. In 1980, Texas's total population was 14,229,191. Approximately 20.98% of that population was Hispanic, 11.89% was non-Hispanic African-American, and 65.7% was Anglo. By the 1990 Census, Texas's total population had increased to 16,986,510, with approximately 22.55% Hispanic, 11.63% non-Hispanic African-American, and 60.59% Anglo. As Texas represented to the Justice Department, "virtually every elected official in the State counts significant numbers of Black, Hispanic, or Asian voters among his or her constituency, and accordingly virtually

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[1] *The Minority Voting Rights Analysis for the Texas House of Representatives 1991 Redistricting Plan* was prepared by the Texas Legislative Council. This is the same committee that formulated the plan that was eventually adopted as House Bill 1, which is being challenged here. This document was part of Texas's "submission concerning the original Texas House Redistricting Plan, House Bill 150 . . . forwarded to the U.S. Department of Justice on November 11, 1991." *See* Letter from John Hannah, Jr., Secretary of State, to Assistant Attorney General (May 15, 1992) accompanying Section 5 submission. It is a public document that sheds light on the legislature's intentions and knowledge concerning the background of HB 1. *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source . . . ."). Appellees have lodged a copy of the *Minority Analysis* with the Court.

every elected official is responsive to some degree to those voters." *Id.*

As the State has concluded, "Texas has undergone more change, perhaps, than any other state in the past few decades, and has emerged as a modern political entity in which full equality in the political arena is assumed, and to which the official discrimination of the past is largely irrelevant." *Minority Analysis* at 1. Certainly, there is no basis for believing that African-Americans or Hispanics have, in recent years, been prevented from registering or voting in Texas, or otherwise fully participating in the political process. To the contrary, "[r]ecent state laws relating to voting exemplify the Legislature's attention to the concerns of minority voters," and demonstrate that Texas has completely "reject[ed] the discriminatory or restrictive practices of the past." *Id.* at 4. For example, the "state has adopted liberalized voter registration and voter residency requirements, and has provided for extended early (absentee) voting and for branch voting locations for early voting to encourage full participation by everyone qualified to vote." *Id.*

In modern Texas, minorities are not prevented from becoming active in party politics. They have not been hampered from choosing the political party they wish to support, or from being active in the affairs of that party. For example, "[b]oth major political parties in 1990 nominated Black candidates to the Texas Court of Criminal Appeals (the state's court of last resort in criminal cases), and voter turnout for those candidates was equivalent to that for other judicial candidates on the state-wide ballot." *Minority Analysis* at 2. In 1986, the Republican Party voted to nominate an Hispanic, Roy Barrera, for the office of attorney general. *Id.* "In 1990, the Democratic Party nominated a[n] Hispanic, Dan Morales, for attorney general in a very competitive primary, and Mr. Morales went on to win the office in the general election with vote totals from across the state comparable to those of other winning candidates." *Id.*

"In Texas today, minorities are fully integrated into the legislative process." *Id.* at 2. When Texas began the redistricting process in 1990, "[a] Black legislator, Wilhelmina Delco, [was]

the speaker pro tempore of the [Texas] House." *Id.* Before that, an "Hispanic representative, Hugo Berlanga, served in that position for four terms (1983-1990). Six [Texas] House committee chairs are Black or Hispanic, and minority legislators are well represented on the most powerful House committees."[2] The Texas Senate committee assignments similarly reveal no pattern of racial discrimination. *Id.*

Similarly, "recent elections have shown [that] racially polarized voting is less prevalent across the state than in the past." *Id.* For at least the past decade, Texas politics has been marked by much cross-over voting, with a significant number of Anglo voters supporting African-American and Hispanic candidates in both primary and general elections. Consequently, since 1983, African-Americans who comprised at least 40% of the population in any given Texas district have been able to elect their candidate of choice approximately 97% of the time. *African-American Success in Texas*, Pl. Ex. 14K, J.A. 137. Since 1983, even when Blacks comprised as little as 35% of a district's population, they were still able to elect their candidate of choice almost 60% of the time. *Id.*

Hispanics have enjoyed similar electoral success. During the last ten years, Hispanic candidates have won at least 20 elections to the U.S. House of Representative, and held four seats at the time of redistricting. Moreover, at least 10 Hispanics have been elected to the Texas State Senate, as well as seven to the Texas State House. "In 1988 Texas voters elected a[n] Hispanic, Raul Gonzales, to the Texas Supreme Court. Justice Gonzales received the third largest number of votes of any candidate on the ballot, after George Bush for president and Lloyd Bentsen for United States Senator." *Minority Analysis* at 2. "The 150-member state House now has 26 Hispanic members, up

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[2] *Minority Analysis* at 2. Minorities account for seven of 23 members of the House Appropriations committees; 4 of 9 members of the Calendars Committee, which determines what bills are considered by the House; 3 of 9 members of the Higher Education Committee; 5 of 15 members of the Redistricting Committee; and 5 of 13 members of the Ways and Means Committee. *Id.*

from 19 in January 1993. One-third of the state's 21 senators are now Hispanic." Susan Warren, *Strong, Savvy Hispanic Politicians Reflect Group's Changing Values*, *Wall St. J.* (Tex. ed.), July 12, 1995, at T1. In addition, Hispanics "wield considerable influence with non-Hispanic candidates who want or need the Hispanic vote." *Id.*

In sum, even "a cursory look at recent and contemporaneous events in Texas reveals the impact of minorities on the political process, the growing open-mindedness of Texas voters, and the responsiveness of state government to minority concerns." *Minority Analysis* at 1.

1. Minority Success in Harris County (CDs 18 and 29)

The evidence of Anglo cross-over voting for minority candidates in Harris County is overwhelming. For example, during the 1980s, African-Americans comprised as little as 35%-40% of the population of old CD 18. Yet, Blacks were able to elect their candidate of choice in CD 18 — from Representatives Barbara Jordan, to Mickey Leland, to Craig Washington — 100% of the time. *Narrative*, J.A. 110. Similarly, during the 1980s, Anglos in Harris County voted for Hispanics about 50% of the time. *See Campos v. City of Houston*, 1995 WL 478151, at *4-5 (S.D. Tex. July 31, 1995) (rejecting allegation of Anglo racial bloc-voting against Hispanics in Harris County, based on the results of the 1981 mayoral election, a 1989 City Council at-large election, and two 1991 City Council races). In Harris County, "party, not race, [is] the decisive factor in determining electoral outcomes." *LULAC v. Clements*, 999 F.2d 831, 883 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

The wide-ranging electoral success of African-American and Hispanic candidates in Harris County over the last two decades illustrates this increasing level of Anglo cross-over voting. "[M]inority candidates, and their victories should be ample proof that, by and large, Houston voters continue to be color-blind when it comes to choosing [their]representatives." *Anti-Petition Fever/Voters Forced Eight Runoff Elections on City Council Staff.* Hous. Chron., Nov. 4, 1993, at 22.

Since 1986, African-Americans in Harris County have maintained at least one representative in the Texas State Senate and six representatives in the Texas State House. Mrs. Charles E. White, an African-American, was first elected in an at-large election to the Board of the Houston Independent School District more than thirty years ago, and in the 1990s more than six African-Americans have served on the Houston Independent School District Board. In 1971, Houston elected an African-American to the Houston City Council in an at-large election. Since 1980, at least seven African-Americans have served on the Houston City Council. Since 1988, Harris County has sent at least one African-American to the Texas Board of Education. During the 1980s and 1990s, numerous African-Americans from Harris County served as judges at all levels of the Texas judicial system.

Hispanics have enjoyed similar widespread electoral success in Harris County. For example, an Hispanic was first elected in a Houston at-large election more than 20 years ago. Before and after the 1993 Houston City Council elections, Hispanics filled three of the Council's fourteen seats. One of these Hispanics was elected at-large. Thus, Hispanics currently hold and have held 21.4% of the Houston City Council seats, while comprising only 15.3% of the city's voting age population. *Campos v. City of Houston*, 1995 WL 478151 at *3. Also, many Hispanics from Harris County have served as judges at various levels of the Texas judicial system.

In Harris County, minorities are able to actively participate in the political process. "Not only have the official barriers to minority participation in the political process been long since removed, but the so-called legacy of that discrimination is no longer a significant factor in the legislative process in Texas." *Minority Voting* at 1.[3]

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[3] There is also evidence that Blacks and Hispanics vote cohesively. *See LULAC*, 999 F.2d at 865 (finding that recent elections "compel[] the conclusion that there is [] black-Hispanic cohesion in Harris [County].").

2. Minority Success in Dallas County (CD 30)

Analyzing judicial elections, the Fifth Circuit, sitting *en banc*, recently found that Anglo cross-over voting for Black candidates in Dallas County during the past decade was as high as 77% and 61%. *LULAC*, 999 F.2d at 861. The lowest level of Anglo cross-over voting that the *LULAC* court found was 31%. *Id.* The Court therefore held that, in Dallas County in the 1980s and 1990s, "elections are determined by straight-party voting in which voters support their party's ticket regardless of the race of the candidates." *Id.* at 877.[4]

As a result, "Dallas in 1995 has opportunities for individuals, regardless of where they come from or who they are." Lori Stahl, *Mayor's Consent Seen as Historic Person From Each of the 3 Largest Ethnic Groups has Shot at Win*, The Dallas Morning News, Mar. 5, 1995, at 1A. To illustrate, the current Dallas mayor, Ron Kirk, is an African-American who previously served as Texas's Secretary of State. In winning the mayoralty, he received nearly 40% of the Anglo vote, even though he faced an Anglo opponent. In addition, one Hispanic, "[Ms.] Saenz-Sarabina and [one African-American][Mr.] Rideaux were [recently] chosen to fill two open seats on the Grand Prairie board." Mede Nix, *More Minorities Find Success at Ballot Box*, The Fort Worth Star-Telegram, May 26, 1995, at 23. Similarly, the Kennendale school district board "counts two African-Americans and one Hispanic among its seven members." *Id.*

In sum, this success story confirms that the lower court correctly determined with respect to Harris and Dallas Counties that "[i]n Texas in the 1990's, it is no longer accurate to assume that this condition [of Anglo majorities voting as a bloc to defeat

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[4] There was substantial evidence presented at trial that the partisan nature of judicial elections in Texas makes electoral data generated from such elections relevant when evaluating congressional vote dilution claims. *See e.g.*, Weber Testimony, 6/29/94 Tr. at 52 ("there is overwhelming evidence of partisan voting in judicial races in Texas"); *see also id.*, 7/1/94 Tr. at 9-10, 22 (noting that the state's expert also included judicial elections in his analysis).

minority candidates] exists in every case." *Vera*, 861 F. Supp. at 1343 n.54.

B. DEVELOPMENT OF TEXAS'S REDISTRICTING PLAN

Prior to HB 1, Hispanics constituted the majority in five of Texas's 27 congressional districts.[5] There was also one African-American opportunity district. *See Narrative*, J.A. 105.[6] Because of the substantial increase in the State's population since 1980, *Id.*, J.A. 104, Texas's congressional delegation increased from 27 to 30 members.

1. The Commitment to "Safe" Single-Race Majority Districts

When Texas began its redistricting process in 1990, it decided that three new minority districts would be created. *See* Brief of the State of Texas on the Merits at 4. ("[t]he Legislature decided early in the redistricting process that the three additional congressional seats that Congress reapportioned to Texas after the 1990 census would all be new minority opportunity voting districts . . . ,") [hereinafter Texas Brief].[7]

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[5] Hispanics were majorities in CDs 15, 16, 20, 23, and 27. CD 18 was an African-American opportunity district. *See Congressional Quarterly's Politics in America 1992: The 102nd Congress* at 1409-91. In this brief, Appellees will use the phrase "opportunity" district to refer to districts in which a particular minority group does not constitute the majority, but is sufficiently large to be able to elect its candidate of choice most of the time. These are to be distinguished from "single-race majority" districts, in which a particular minority group constitutes more than 50% of the inhabitants in a district.

[6] In 1980, African-Americans comprised 40.8% of the population in CD 18. Projected Population Changes in Texas Districts, Pl. Ex. 13B, at 55. By 1990, this figure had dropped to 35%. *Narrative*, J.A. 105. As noted, however, Blacks were consistently able to elect their candidate of choice in this district.

[7] Texas made extensive efforts during the redistricting process to guarantee that bloc voting by a single minority group would allow it to control election outcomes without the need to form coalitions with other groups —

(footnote continues)

Plans were submitted that would have further enhanced the voting strength of minority voters while still respecting other traditional districting principles. Rejecting these more compact, alternative redistricting plans, the Texas Legislature in 1991 adopted plan C657 as House Bill 1. Stipulations of the parties in *Vera v. Richards* (June 30, 1994), J.A. 64, 71. This plan created three new, safe, single-race majority districts for Blacks and Hispanics (CDs 28, 29, and 30), and increased the African-American population in another, CD 18, rendering it a safe, single-race majority district as well.

The Senate congressional redistricting panel's first proposed plan did not create a majority African-American district in Dallas County, but rather a new district that was "only" 39% African-American. Newspaper Article from Times Herald Washington Bureau, U.S. Ex. 1033, J.A. 347. Then-state Senator Eddie Bernice Johnson, an African-American who aspired to (and now does) represent CD 30, and who was in charge of the redistricting process in the Texas Senate, *Vera*, 861 F. Supp. at 1313, also submitted her own plan proposing a more compact CD 30 than now exists. Under her plan, CD 30 would have been 44.5% African-American and 23.5% Hispanic. Map of Texas Proposed Congressional Districts Plan C500, PL. Ex. 29A, J.A. 139.

In response to these proposals, Dallas's Black leaders demanded a 50% Black district. U.S. Ex. 1033, J.A. 347-48. Thereafter, then-state Senator Johnson made the creation of a single-race majority district for the African-American residents of Dallas her "dominant goal" in the redistricting process:

> I had made a commitment to that Black community, that they would have a safe district, as had been mandated and expected for a number of years, and I did not intend to go home without that.

(footnote continued)

thus, making the seats racially "safe." These efforts highlight the disingenuousness of Texas's attempt now to characterize these racially gerrymandered seats as minority "opportunity" districts. *See, e.g.*, Texas Brief at 2-4, 23.

Johnson Deposition, 6/13/94 Tr. at 231, J.A. 426. *See also* Blair Testimony, 12/12/91 Tr. at 108, J.A. 410 (the African-American community "wanted nothing less than a 50 percent Congressional district").

Texas reported that Dallas's African-Americans felt that such a district "was necessary to assure its ability to elect its own Congressional representative without having to form coalitions with other minority groups." *Narrative*, J.A. 106. Then-state Senator Johnson explicitly sought to satisfy this desire to have "a safe Black district without having to build coalitions." Johnson Deposition, 6/13/94 Tr. at 237, J.A. 432. "In the end, this idea of a 50 percent [black] district grew and it took on a life of its own, and Eddie Bernice [Johnson] had no way to compromise on that issue." U.S. Ex. 1033, J.A. 348 (internal quotations omitted).

Similarly, various interest groups asserted the claims of Hispanics in Harris County. *Vera*, 861 F. Supp. at 1324. Roman Martinez, "the primary architect of the lines in Harris County," *id.*, said that Texas's goal was "to insure that we created for the first time a Congressional seat for the Hispanic community to elect the first Hispanic Congressman." Martinez Testimony, 12/12/91 Tr. at 134, J.A. 415. As the Department of Justice reports, "[a]t the outset of the 1991 redistricting, Hispanics in Harris County made clear that they opposed the creation of districts in which blacks and Hispanics were combined to form a majority . . . [T]hey favored a plan that would create a[n Hispanic] district while retaining a black opportunity district." Brief of the United States Department of Justice at 10 [hereinafter DOJ Brief].[8]

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[8] Rep. Martinez later testified that, in creating Districts 18, 29, and 30, the Legislature's "main emphasis was to try to make sure that the Hispanic district in Harris County was going to elect a[n] Hispanic and that the Black district in Dallas was going to elect [a Black]." *Martinez Testimony*, 12/12/91 Tr. at 137-38, J.A. 418. Christopher Sharman, the state's chief computer operator who was responsible for drawing district boundaries, admitted that in Harris county the state was "creating a Hispanic district, so yes, [Texas] put Hispanics in — in the 29th." Sharman Deposition, 6/18/94 Tr. at 164, J.A. 491.

All of the participants in Texas's redistricting process were aware that the United States Department of Justice at this time essentially required states to maximize single-race majority districts. *See Miller v. Johnson*, 115 S. Ct. 2475, 2483-84, 2489 (1995) (describing the Justice Department's maximization policy). At various points in the redistricting process, individuals committed to securing three single-race majority districts used the threat of Justice Department intervention to intimidate other legislators into accepting a plan that created three single-race majority districts.[9]

Later on, the shapes of the district lines were somewhat altered to accommodate the interests of certain (white Democratic) House incumbents, who sought African-American voters to aid their reelection chances. But the legislature never permitted those accommodations to detract from the primary goal of creating racially safe districts. The minority voters assigned to the adjoining incumbents' districts in Dallas County were generally those who were less likely to vote, and therefore less desirable to Eddie Bernice Johnson. Johnson Testimony, 12/12/91 Tr. at 234-35 & 248-49, J.A. 429-30 & 435.[10]

Thus, in designing these "safe," single-race majority-minority districts, the desires of incumbent congressmen were always reconciled with the preservation of these districts' racial character. In fact, during the redistricting process Texas Lieutenant Governor Bullock made clear that "what the black community says it needs, that's what [the Legislature's] going to do." U.S.

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[9] *See, e.g.*, U.S. Ex. 1033, J.A. 348 (State Representatives "[Johnson and Blair] promised legal action to overturn any redistricting plan they did not accept, including intervention with the Justice Department."); Letter from Eddie Bernice Johnson to the Department of Justice, Civil Rights Division, Pl. Ex. 6E (complaining about treatment of Blacks in Tarrant County.)

[10] *See also Narrative*, J.A. 107 (goal in Dallas was "not only [to] create a district that would maximize the opportunity for the black community to elect a Congressional candidate of its choice in 1992, but also one that included some of the major black growth areas which will assure continued electoral and economic opportunities over [time]"); Texas Brief at 42.

Ex. 1033, J.A. 349 (internal quotation omitted). As Congressman Bryant, one of the incumbent congressmen fighting for minority voters stated, "[i]t was largely out of our hands after that." *Id. (internal quotation omitted); see also Vera*, 861 F. Supp. at 1320 n.20.

2. The Means of Achieving "Safe" Single-Race Majority Districts

To achieve the goal of creating these new, safe, single-race majority districts, Texas used sophisticated computer software to draw congressional districts along precise racial lines. *Vera*, 861 F. Supp. at 1336 ("Racial data were an omnipresent ingredient in the redistricting process."). This software, known as REDAPPL, could have handled a variety of demographic data (*e.g.*, income, education, etc.). But the state chose to program REDAPPL to constantly evaluate and display on the computer monitor congressional districts, counties, cities, VTD's ("voter tabulation districts" or precincts), and even census blocks, by race only. REDAPPL ensured that when the State redrew its congressional boundary lines, it had "nearly exact knowledge of the racial makeup of every inhabited block of land in the state." *Id.* at 1309. As a result, REDAPPL "provided a readily available, efficient means of" allocating voters "on the basis of race." *Id.* at 1318.

Other than racial data, the REDAPPL system had voting data, but only down to the precinct level. Once a precinct was split, all data was lost except for racial data, which was available at the block level. Thus, racial information "was the most specific information that could be used by those involved in the districting process." *Id.* at 1336.

Then-state Senator Johnson agreed that REDAPPL was essential to the redistricting process. She praised the State's ability to use computers to divide counties, cities, towns, and precincts by race. "When I look at these [redistricting] maps I thank God for computers." Excerpts from Senate Committee of the Whole Hearing on Redistricting, Aug. 24, 1991, at 14, U.S. Ex. 1092, J.A. 369.

C. TEXAS'S REDISTRICTING PLAN

Texas's plan, as adopted, split thirty-four counties. Only six of these splits were required because the population of those counties exceeded the number of persons required for a single district.[11] The boundaries of all of these districts appear to be drawn exclusively to achieve the desired racial composition. *Vera*, 861 F. Supp. at 1339, 1340-41.[12]

The correlation between race and the district boundaries was nearly perfect. "The borders of Districts 18, 29 and 30 change from block to block, from one side of the street to the other, and traverse streets, bodies of water, and commercially developed areas in seemingly arbitrary fashion until one realizes that those corridors connect minority populations." *Id.* at 1336.

1. CDs 18 and 29 (Harris County/Houston).

Prior to the 1991 redistricting, Hispanics constituted 42.2% of CD 18 while, as noted, African-Americans made up 35.1% of that district. Houston's integrated housing patterns therefore posed a practical barrier to the creation of two compact districts in which one minority group would constitute a majority. The United States admits that, in Harris County, it was only "possible to create one reasonably compact district in which blacks would have an opportunity to elect the candidate of their choice *or* one reasonably compact district in which Hispanics would have an opportunity to elect the candidate of their choice." DOJ Jurisdictional Statement at 11 (emphasis

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[11] By comparison, the 1980 congressional redistricting plan split just 10 counties. Three of those splits were required by the "one-person, one-vote" rule. *See e.g.*, Texas Congressional Districts for the 99th-102nd U.S. Congress, Pl. Ex. 27; Weber Report, Pl. Ex. 36, J.A. 162.

[12] *See also Vera*, 861 F. Supp. 1304. Indeed, the same may be said about almost all of Texas's congressional districts. *Id.* at 1326 ("Many of the remaining districts challenged by the plaintiffs share a troubling characteristic: counties within the district appear to be split along racial lines."). These counties include virtually all of Texas's cities, including Amarillo, Lubbock, Bryan, Midland, Odessa, Denton, Plano, Garland, San Angelo, Tyler, and others. *Id.* at 1326-28.

added).[13] Nonetheless, new CD 18 contains 50.9% total Black population and new CD 29 contains 60.6% Hispanic population. *Id.*[14]

In choosing to create *both* a majority Black and a majority Hispanic district in Harris County, Texas necessarily chose to either (1) draw both districts in such a way that neither of them is "reasonably compact," or (2) draw one of the districts in a compact fashion and draw the other in an irregular manner. *See* Texas Jurisdictional Statement at 6 ("To draw both a majority-black district and a majority-Hispanic district, however, it was necessary to draw districts with somewhat irregular lines.").

The State was able to create both a majority-Black and a majority-Hispanic district in Harris County only by drawing districts at the block level and by splitting most of the precincts and substantially all the municipalities in the area.[15] Analysis of the split precincts revealed that "an overwhelming majority of those individuals placed in District 29 were Hispanic while an overwhelming majority placed in District 18 were African-American." *Vera*, 861 F. Supp. at 1341 n.51.

More than 50% of the VTDs were split, and 60% of the residents in CDs 18 and 29 live in split VTDs. *Id.* at 1340. Due to

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[13] *See also* DOJ Jurisdictional Statement at 6; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," And Voting Rights: Evaluating Election-District Appearance After Shaw v. Reno*, 92 Mich. L. Rev. 483, 563-64, 567, 569 (1993) [hereinafter Pildes & Niemi]. At trial, Mr. Sharman also admitted that because of Houston's integrated residential neighborhoods, it was not possible to create both a compact majority-black district and a compact majority-Hispanic district. Sharman Testimony, 6/30/94 Tr. at 69.

[14] In drawing these districts, the Texas Legislature again rejected more compact proposals. Eddie Bernice Johnson's plan for CD 18 would have been 46.9% African-American, for example. Her proposed CD 29 would have been 47.6% Hispanic. *See* Texas Proposed Congressional Districts, Pl. Ex. 29A, J.A. 139.

[15] All eight of the cities found in CD 18 have split populations; fourteen municipalities in CD 29 are split. Map of Harris County U.S. Congressional Districts 103rd-104th Congresses 1989 City Limits, Pl. Ex. 34D(1), J.A. 147 (map of CDs 18 and 29 showing split municipalities).

the absence of voting data at the block level, this necessarily means that at least 60% of these voters must have been allocated according to race.[16]

"Congressional Districts 18 and 29 were tailored to include designated numbers of minority voters." *Id.* at 1339. "An appreciation for the precision with which [the]segregation of Hispanics and African-Americans in Harris County was carried out may not be had without a detailed look at the map of District 18 based on African-American population distribution by Census block and the map of District 29 based on Hispanic population distribution by Census block." *Id.* at 1323.[17] "In fact, these districts are so finely "crafted that one *cannot* visualize their exact boundaries without looking at a map at least three feet square." *Id.* (emphasis in original). (Appellees have lodged such over-sized maps with the Court.) Districts 18 and 29 have been categorized as among the most non-compact in the nation. *See* Pildes & Niemi *supra* note 13, at 563-64, 567, 569.

2. CD 30 (Dallas County)

"Throughout the course of the Congressional redistricting process, the lines of the proposed District 30 were constantly reconfigured in an attempt to maximize the voting strength for this black community in Dallas County." *Narrative*, J.A. 106. As a result, CD 30 "is at least 25 miles wide and 30 miles long, but those measurements do not begin to reveal the district's

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[16] Only 221 of the existing 672 precincts in Harris County were *not* split by HB 1. Moreover, in Harris County alone, the number of precincts rose from 672 to 1225, with 140 of those precincts having fewer than 20 registered voters. In addition, 62 precincts had no registered voters whatsoever. Letter regarding Split-Precincts in Harris County, Nov. 2, 1991, Pl. Ex. 6E1, at 3-4, J.A. 123-125; *See also id.*, attachment A (Map of Precinct 607 split into 9 precincts.)

[17] *See also* Map of Harris County Black Population Distribution by VTD, Plan C657, Pl. Ex. 34H8, J.A. 151; Map of Harris County Hispanic Population Distribution by VTD, Plan C657, PL. Ex. 34H9, J.A. 152.

geographical complexity." *Vera*, 861 F. Supp. at 1338. Sprawling throughout Dallas County, CD 30 splits all 21 of the municipalities found in the district.[18]

"To create a 50 percent black district, the proposed district [30] snaked through North Dallas into Plano, sometimes forming corridors barely wider than Central Expressway and LBJ Freeway." U.S. Ex. 1033, J.A. 349. "In some integrated parts of Pleasant Grove and Oak cliff, neighborhoods were divided so that black apartment dwellers are in one district while their white neighbors are in another district." *Id.*

CD 30 extends fingers into Collin County, which includes only the outermost suburbs of Dallas, picking up one small African-American neighborhood. The district reaches into Tarrant County, where it picks up a small border area with a high African-American concentration. *See Vera*, 861 F. Supp. at 1337-38; Map of Texas Districts of the 103rd U.S. Congress Plan C657 Dallas County, PL. Ex. 34H2, J.A. 146.

"Republican state Rep. Fred Hill of Richardson protested that if you live more than 100 yards off the freeway, you're out of [] district [30] at some points." U.S. Ex. 1033, J.A. 349. "Part of the district [even] runs along the [uninhabited] Trinity River bottom, using it to connect dispersed minority population[s]." *Vera*, 861 F. Supp. at 1338. This was thought necessary, in part, because as "the principal architect" of CD 30, *id.* at 1320, then-state Senator Johnson, testified: since 1980 "the whole core of th[e Black] area was moving out." *Id.*

As in Houston, racially integrated residential neighborhoods in Dallas County presented a substantial impediment to creating single-race majority districts. The only "remedy" to this residential integration was splitting precincts by race. Thus, after redistricting, 39% of the population of CD 30 live in split precincts. Report of District by Voter Registration and Turnout Analysis Using Hispanic and Non-Hispanic Registered Voter

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[18] Map of Split Cities in Texas Districts of the 103rd U.S. Congress Plan C657 Dallas County, PL. Ex. 34D(2), J.A. 148 (map of CD 30 showing split municipalities).

Allocation by 1990 VTDs, PL. Ex. 34R. In addition, there are 17 precincts with fewer than 20 registered voters and 13 precincts with no registered voters at all. Report of District with Whole/Split Counties and Split 1990 VTDs with Ethnic Composition, PL. Ex. 34Q. As the lower court found, "the contours of Congressional District 30 are unexplainable in terms other than race. They have no integrity in terms of traditional, neutral redistricting criteria. Neighborhoods, VTDs, and individual streets were split to achieve the district's racial mix." *Vera*, 861 F. Supp. at 1339.

D. THE TERRAZAS v. SLAGLE LITIGATION

HB 1 was unsuccessfully challenged by certain Republicans as an unconstitutional partisan gerrymander in violation of *Davis v. Bandemer*, 478 U.S. 109 (1986), and by certain minorities as an unlawful vote dilution under Section 2 of the Voting Rights Act. *Terrazas v. Slagle*, 821 F. Supp. 1162 (W.D. Tex. 1993). At trial, Congresswoman Johnson testified that race, not partisanship, was the most important factor in the redistricting process. She stated "[m]y goal in Congressional redistricting was to be sure that minorities had the maximum number of seats that they could have." Johnson Testimony, 12/12/91 Tr. at 232, J.A. 426.[19]

In the *Terrazas* action, Congresswoman Johnson further testified that her sole focus in drawing CD 30 was looking out for African-American voters, and that she did not worry about the influences of incumbent Congressman Martin Frost or John Bryant. When asked, she denied accommodating Congressman Frost and Bryant, stating that "I got beat up so many times because I wouldn't do anything but look out for Black voters." Johnson Testimony, 12/12/91 Tr. at 247, J.A. 435, *quoted in Vera*, 861 F. Supp. at 1320.

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[19] In general, the district court found the testimony provided by Texas redistricting officials in the *Terrazas* litigation, and particularly that of Congresswoman Johnson, to be more credible than their testimony in this case. *See Vera*, 861 F. Supp. at 1321.

Ms. Johnson attributed the bizarre boundaries of CD 30 to two competing tensions — (1) the fact that the District was intended to be a safe African-American district; and (2) the fact that the African-American population of Dallas County had dispersed. "In sum, Congresswoman Johnson testified in *Terrazas* that the shape of Congressional District 30 . . . can be understood as a conscious effort to pick up African-American voters who had dispersed from the core area." *Vera*, 861 F. Supp. at 1320.

In addition, Sen. Johnson testified that, to effectuate the overriding goal of racial safety, she was allowed to pick and choose among "performing" African-American voters. This left the "non-performing" African-American voters for incumbents Bryant and Frost. Johnson Testimony, 12/12/91 Tr. at 248, J.A. 435, *quoted in Vera*, 861 F. Supp. at 1320; *See also* Blair Testimony, 12/12/91 Tr. at 108-109.

Similarly, Rep. Martinez testified that the creation of two single-race majority districts was the primary motivating factor in the redistricting of Harris County:

> Again, the first goal was to assure no retrogression for the 18th Congressional District, insuring that was maintained as an African-American district. And then, secondly, it was a very important goal as a Hispanic representative to insure that we created for the first time a Congressional seat for the Hispanic community to elect the first Hispanic Congressman.

Martinez Testimony 12/12/91 Tr at 134, 146, J.A. 415, 421, *quoted in Vera*, 861 F. Supp. at 1324.

Although the *Terrazas* court ruled that the 1991 Texas Congressional Redistricting plan did not dilute the voting rights of racial, ethnic, or political minorities, the court noted that "the configuration of District 30 closely resembles a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule *as the most gerrymandered district in the United States.*" *Terrazas v. Slagle*, 789 F. Supp. 828, 834 (W.D. Tex. 1991) (emphasis added) (preliminary proceeding in the *Terrazas* litigation). *Terrazas v. Slagle*, 789 F. Supp.

828, 834 (W.D. Tex. 1991) (emphasis added) (preliminary proceeding in the *Terrazas* litigation).

E. DECISION BELOW

Plaintiffs filed this constitutional challenge on January 26, 1994.[20] The case was tried before a three-judge panel on June 27-30, and concluded on July 1, 1994. The District Court filed its Opinion on August 17, 1994. The court concluded that Texas "repeatedly segregated [African-American, Hispanic, and Anglo] populations by race to further the prospects of incumbent officeholders or to create 'majority-minority' Congressional districts." *Vera*, 861 F. Supp. at 1309. The court found that CDs 18, 29, and 30

> were conceived for the purpose of providing 'safe' seats in Congress for two African-American [representatives] and an Hispanic representative[]. They were scientifically designed to muster a minimum percentage of the favored minority or ethnic group; minority numbers are virtually all that mattered in the shape of those districts. Those districts consequently bear the odious imprint of racial apartheid, and districts that intermesh with them are necessarily racially tainted.

Id.

The district court rejected Texas's argument that incumbency protection, and not invidious racial discrimination, explained the bizarre nature of the districts. Citing the inconsistent evidence submitted at trial and the failure of witnesses involved in the redistricting process to appear, the court found as a matter of fact that:

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[20] Their original complaint asked for a permanent injunction and declaratory judgment against the Governor, the Lieutenant Governor, the Attorney General, and the Secretary of State, as well as the Speaker of the Texas House of Representatives. The court later granted the motions to intervene of six African-American voters ("Lawson Intervenors"), the United States, and seven registered Hispanic voters and the League of United Latin American Citizens (together "Reyes Intervenors").

> [T]he policy of incumbent protection, to the extent it motivated the Legislature, was not a countervailing force against racial gerrymandering. Instead, racial gerrymandering was an essential part of incumbency protection, as African-American voters were deliberately segregated on account of their race among several Congressional districts.

Vera, 861 F. Supp. at 1339.[21]

Applying strict scrutiny, the district court found that, even if the Voting Rights Act could substantiate a compelling governmental interest, the State's admission "that more traditional districts could have been fashioned," *Vera*, 861 F. Supp. at 1342, made it "impossible" for the State to argue "that Districts 18, 29, and 30 are 'narrowly tailored' to fulfill the State's obligations under the Voting Rights Act and would thus withstand the strict scrutiny test." *Id.*

F. APPEAL FROM THE DISTRICT COURT

The State's notice of appeal was filed on September 22, 1994, and its Jurisdictional Statement was submitted on October 31, 1994. The Lawson and Reyes Defendant-Intervenors submitted their Jurisdictional Statement on November 2, 1994. The Plaintiffs filed their Motion to Affirm on November 30, 1994. On June 29, 1995, the Court noted probable jurisdiction.

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[21] The District Court noted that a number of high-level Texas officials involved in formulating HB 1 refused to testify in this case. *See Vera*, 861 F. Supp. at 1338. For example, Robert Mansker, an aide to Congressman Frost and a major figure in the Texas redistricting process, successfully avoided being served with a subpoena to testify in this case. Affidavit of Stefon R. Whiting, Sr., June 22, 1994, PL. Ex. 37, J.A. 188-90. Similarly, Matt Angle, another top Texas redistricting official, succeeded in avoiding service and refused to testify. Congressman Frost later confirmed that Angle and Mansker purposely avoided being served: "'Let's just say they weren't around for a couple of days.'" Ron Hutcheson, Frost Aides Evaded GOP Subpoena, Fort-Worth Star Telegram, July 28, 1994, at 1. Mansker's failure to testify was particularly important, given that Texas's redistricting "plan was the product of Bob Mansker." *Almanac of American Politics 1994* at 1207.

The Court has jurisdiction over this matter under 28 U.S.C. § 1253 (1988).[22]

SUMMARY OF ARGUMENT

Carefully weighing all of the evidence, the three-judge district court unanimously rejected the Appellants' contention that incumbency protection was the primary motivation for the creation of three new, bizarre, single-race majority congressional districts. To the contrary, the district court concluded that Texas had subordinated other considerations to the overriding and predominant goal of establishing three "safe," single-race majority seats in CDs 18, 29, and 30. Although the lower court recognized that incumbents were permitted to influence the eventual shape of adjoining districts, the court found that the interests of these incumbents were always secondary to the objective of maintaining three "safe," single-race majority districts.

In so finding, the district court relied on copious evidence that Texas was predominantly motivated by race. To illustrate,

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[22] With respect to certain other Texas congressional districts plaintiffs challenged as unconstitutional, the district court found "an extremely high correlation between the irregular features of many of these districts and the racial populations they are drawn to include or exclude." *Vera*, 861 F. Supp. at 1345; *see also* Maps of Split Counties (Black & Hispanic Populations), PL. Ex. 34(H). Nonetheless, the court determined that "[i]t does not follow . . . that racial gerrymandering occurred." *Vera*, 861 F. Supp. at 1345. The court based this judgment on its view that the outlines of these other districts were not "highly irregular apart from the small racially distinct appendages." *Id.* While Plaintiffs respectfully disagree, particularly in light of this Court's opinion in *Miller v. Johnson*, 115 S. Ct. 2475 (1995) the district court's ability to distinguish between the three districts that "function primarily to include sufficient numbers of the favored minority groups," *Vera*, 861 F. Supp. at 1345, from the 21 districts created to serve "both race and politics," *id.*, refutes any concerns that the Court's *Miller* standard is not judicially manageable. *See also DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *dismissed for want of a substantial federal question*, 115 S. Ct. 2637 (1995) (rejecting racial gerrymandering challenge to California's congressional reapportionment plan).

past voting data was *not* made available to the map drawers at the block level; such data was only available at the precinct level. Those drawing the maps did, however, have constant access to racial data on a block-by-block level. In constructing these bizarre, single-race majority districts, Texas split a vast number of precincts. Since partisan election results were not available once a VTD was split, these precincts, which comprise 60% of Harris County's population, for example, are inevitably divided along racial, and not partisan lines.

Primarily, Texas used race for the purpose of constructing three non-compact single-race majority districts because it believed that the Justice Department required it to do so and because certain African-American and Hispanic elites demanded them. In addition, Texas used "race as a proxy," *Miller v. Johnson*, 115 S. Ct. 2475, 2487 (1995), as a tool, for protecting incumbents. Texas argues that the use of race as such a tool prevents strict scrutiny from applying. This argument must be rejected. *Miller* unequivocally rejected the "demeaning notion" that "individuals of the same race share a single political[] interest" and may therefore be grouped together on that basis. *Id.* (citations and quotation marks omitted).

Moreover, given that "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), the Court would put an end to all *Shaw* claims if it were to accept Appellants' contention that strict scrutiny does not apply because the racial divisions Texas created served the ends of various incumbents, or if it were to require the plaintiffs to prove that every point on a district's border was based solely on race. *Shaw v. Reno*, 113 S. Ct. 28161 2816 (1993). The Equal Protection Clause teaches that there are limits on what politicians and state governments may do, even where a goal is to secure their own reelection. After all, the white primary and the poll tax may have been effective means of protecting incumbents, but they are clearly unconstitutional.

Essentially applying *Miller's* predominant factor test even though *Miller* had not yet been decided by this Court, the lower

court held that three of the 24 districts challenged by the Appellees should be subjected to strict scrutiny. Although the district court found evidence that race played a significant role in the formation of many of the other districts, including two other single-race majority districts, the lower court held that race was *not* the primary motivation in their creation. The district court's ability to distinguish between districts that should appropriately be subjected to strict scrutiny, and those that it determined should not, illustrates the manageability of *Miller's* predominant-motivation test. It also rebuts the Chicken Little cries of Appellants that *Miller* means open season on all of the Nation's 435 congressional districts, or its many single-race majority districts.

The district court's judgment that the state's predominant motive in redistricting was racial is not clearly erroneous. Accordingly, under this Court's decisions in *Shaw* and *Miller*, Texas's redistricting plan must be subjected to strict scrutiny.

Texas's proclamation that its goal in redistricting was incumbency protection precludes it from shifting rationales in an attempt to satisfy strict scrutiny, by claiming that its purpose in drawing these bizarre, single-race majority districts was remedial. As the district court properly found, "the state cannot have it both ways." *Vera*, 861 F. Supp. at 1338. The state's use of race for the admittedly non-remedial purpose of protecting incumbents is by itself sufficient to warrant a finding that CDs 18, 29, and 30 are unconstitutional.

This Court should therefore refuse even to examine Texas's contention that, if this Court were to apply strict scrutiny, the Voting Rights Act required Texas to draw such districts. *Post hoc* rationales are not permitted to satisfy strict scrutiny. But even if this Court were to take the unprecedented step of examining such a rationale, it is patently faulty. In fact, the Voting Rights Act is not even relevant — unless it is perfectly consonant with the constitutional requirement that race can only be used to remedy identifiable past discrimination. If the Voting Rights Act is so construed, Appellees still must prevail because neither the Constitution nor

that Act can be interpreted to require the construction of these three bizarre, single-race majority districts.

Here, Texas never even attempted to determine whether its customary redistricting process would have produced racially discriminatory districts. Without such a step, Texas could not possibly make a case that the Voting Rights Act compelled it to create these three bizarre districts, let alone show that it has correctly ascertained its obligations under the Voting Rights Act, as it is required to do. Requiring States to undertake such a searching factual inquiry would enable courts to assess whether in fact a problem exists in the voting process that necessitates drawing legislative districts along racial lines. Such a requirement would also give guidance to State legislatures as they commence their redistricting process.

In any event, Section 5 of the Voting Rights Act does not apply because retrogression is not an issue here; these are new single-race majority-minority districts. The lower court also properly held that the *Thornburg v. Gingles*, 478 U.S. 30 (1986) factors could not be satisfied here because of the bizarre, non-compact nature of the three districts. It further found that the third *Gingles* precondition — racial bloc voting by Anglos — is not present in Texas today. Rather, the lower court found as a matter of fact that, "[i]n Texas in the 1990s, it is no longer accurate to assume that this condition [of Anglo majorities voting as a bloc to defeat minority candidates] exists in every case." *Vera*, 861 F. Supp. at 1343 n.54. In addition, Section 2 does not compel the construction of these districts because Texas cannot possibly show that, in modern Texas, African-Americans or Hispanics have been denied an equal opportunity to participate in the political process and to elect their representatives of choice. Indeed, interpreting the Voting Rights Act to compel these districts would require a finding that the Voting Rights Act itself is unconstitutional.

The district court also rejected the arguments, renewed here, that Texas had a compelling governmental interest apart from the Voting Rights Act to engage in racial gerrymandering. Even assuming that such an interest were to exist, and it does not,

Texas has not made any showing other than a claim that it wishes to remedy general societal discrimination. This Court has, of course, regularly rebuffed attempts to use race for such an untrammelled purpose.

This Court should affirm the lower court's determination that, in any event, the bizarre, single-race majority districts adopted here are not narrowly tailored to accomplish a legitimate, remedial objective, particularly in light of the more compact alternatives ignored by the legislature. Race-based remedies are constitutional only for identifiable victims of racial discrimination. In the voting rights context, this requires a finding that individuals of a particular race are being denied, on account of their race, a meaningful opportunity to vote together with other people with whom they live. The appropriate remedy in such a case — and the approach rejected by Texas here — is to keep those individuals together as a community, and enable them to vote in the same compact district. "Capturing" other individuals who share the same skin color, while excluding the people with a (possibly valid) Section 2 claim, does not provide remedies for those individuals who have been denied equal voting rights.

Indeed, such forbidden racial stereotyping is premised on the erroneous assumption that every minority "think[s] alike, share[s] the same political interests, and prefer[s] the same candidates" as others who share their skin color. *Shaw*, 113 S. Ct. at 2818. To put it more simply, if an African-American in South Dallas is a victim of racial discrimination in voting, his problem is not solved because an African-American in North Dallas, or the neighboring city of Plano, is captured to take his place. Yet that is the position of the Appellants.

This Court has already made clear in both *Shaw* and *Miller* that race-based districting raises the most serious equal protection concerns. Continued vindication of those concerns requires that the lower court be affirmed.

ARGUMENT

I. APPELLEES HAVE STANDING TO CHALLENGE DISTRICTS 18, 29, AND 30 UNDER THE FOURTEENTH AMENDMENT.

The allegations that Appellees lack standing ignores this Court's decision last Term in *United States v. Hays*, 115 S. Ct. 2431 (1995). There, the Court held that "[w]here a plaintiff resides in a racially gerrymandered district,[] the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing." *Id.* at 2436. Because all of the Appellees either live in or next to the districts under challenge, *see* Texas Jurisdictional Statement at 20-21, they have standing to bring this suit.

A. Voters Who Live in Districts that Have Been Drawn Along Racial Lines Have Standing to Challenge Such Districts.

This Court has consistently "recognized the harms caused by racial classifications." *Hays*, 115 S. Ct. at 2435. One of those harms, which this Court has said is cognizable under the Fourteenth Amendment, is being subjected to a redistricting scheme that "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw*, 113 S. Ct. at 2828. Such schemes "reinforce [] racial stereotypes and threaten [] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Id.*

Under *Hays*, "[a]ny citizen able to demonstrate that he or she personally has been injured by that kind of racial classification has standing to challenge the classification in federal court." *Hays*, 115 S. Ct. at 2436. Appellees therefore have standing to bring this Equal Protection claim "because they have established that they are registered to vote in [Texas's] congressional elections and that the challenged redistricting plan assigns them to vote in particular electoral districts at least in part because of

their race." *Shaw v. Hunt*, 861 F. Supp. 408, 473 (E.D.N.C. 1994).

B. Appellees Suffered Identifiable Stigmatic and Systemic Harms

The Appellees in this case have also suffered from "the special representational harms racial classifications can cause." *Hays*, 115 S. Ct. at 2436; *see also Shaw*, 113 S. Ct. at 2827-28 (identifying stigmatic and systemic harms flowing from bizarre, racially gerrymandered districts). For example, Appellee Edward Blum testified that he felt stigmatized by Texas's racially polarized redistricting process. *See* Texas Jurisdictional Statement at 20.

Moreover, these bizarre districts harmed the Appellees by creating barriers to political participation, candidate effectiveness, and responsive representation. The isolated and distended pockets of voters created by the otherwise irrational construction of the districts under challenge here spawned administrative confusion and electoral barriers to voter participation. *See Vera*, 861 F. Supp. at 1334 n.43, 1339 ("The effect of splitting dozens of VTD's to create Districts 18 and 29 was an electoral nightmare."); *see* PL. Ex. 6E1, J.A. 121. For example, describing CD 30 as the "portrait of a racial gerrymander," voting rights scholars criticized it as creating havoc for "members of Congress as they campaign for election and re-election, and for voters as they seek constituency services." Carol Swain, *Black Faces, Black Interests* 196-197 (1995).

In CD 18, voters, including Appellees, were frustrated and confused by the district's meandering shape. They did not know the candidates running for office, and asked why the district had been arbitrarily changed. *See* Powers Deposition, 4/26/94 Tr. at 43-44, J.A. 445, 446-47. Plaintiff Edward Blum, who ran for Congress in new CD 18 in 1992, testified that he "and his wife spent months walking the entire district in order to shake hands with the voters. They had to carry a map to identify the district lines, because so often the borders would move from block to

block." *Vera*, 861 F. Supp. at 1340 (citing Blum Testimony, 6/27/94 Tr. at 20-21).

Similarly, as a result of CD 29's "tortuous[]" boundaries, "voters were confused and frustrated. They did not know why their district had been arbitrarily changed, and they did not know the candidates running for office. . . . The boundaries had become so complex that the county clerk's office sent the wrong ballots to certain precincts and erroneously counted those votes within District 18." *Id.*

Moreover, as an Anglo candidate for Congress in CD 18, Blum has standing because one of Texas's primary purposes in constructing these three single-race majority districts was to ensure that he would not be elected on account of his race. The testimony of Texas's legislators makes clear that Texas's intent was to create safe districts in which only a candidate of a specific race would be elected.[23] Such overt racial acts constitute an "abridgement of [Blum's] right to participate in the electoral process [in violation] of the Fourteenth Amendment." *Shaw*, 113 S. Ct. at 2847 (Souter, J., dissenting). Plainly, Blum, if no one else, has suffered a particularized harm.

As the district court recognized, Appellees were also harmed by Texas's flagrant disregard of traditional districting principles, which impeded effective citizen participation in politics:

> Traditional, objective districting criteria are a concomitant part of truly 'representative' single member districting plans. Organized political activity takes place most effectively within neighborhoods and communities. . . . When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished.

Vera, 861 F. Supp. at 1334 n.43.

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[23] *See, e.g.*, Blair Testimony, 12/12/91 Tr. at 108, J.A. 410 (Legislature was trying to "present an opportunity to elect *an African-American*") (emphasis added); Martinez Testimony, 12/12/91 Tr. at 134, J.A. 415.

Non-compact districts interfere with or preclude effective political representation. Compactness enables a district to "retain[] a natural sense of community. . . . [A] district should not be so convoluted that its representatives [can] not easily tell who actually lives within the district." *East Jefferson Coalition v. Jefferson Parish*, 691 F. Supp. 991, 1007 (E.D. La. 1988). "[T]ortuously drawn districts that snake through areas with high concentrations of minorities have no sense of shared interests and no geographical balance." Brief of *Amici Curiae* on behalf of Craig Washington at 16 in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993). Even though all of the voters in CDs 18, 29, and 30 are located within one major metropolitan area, they retain no "sense of community."

Moreover, the numerous and artificial district boundaries meant that Appellees could not discuss candidates with their neighbors. For example, in the *Terrazas* action, Lee Jackson, a Dallas County judge and a former Texas House member who actively participated in drawing Texas's district lines after the 1980 census, testified that the bizarre shape of CD 30 made it "impossible for citizens in communities to identify with their congressman. . . ." Trial Tr. 12/12/91 at 56; *see also* Weber Report, PL. Ex. 36, J.A. 162; PL. Post-Trial Brief at 8.

Appellees have unquestionably suffered cognizable injuries and individualized harm due to HB 1. These injuries would be redressed by the constitutional reconfiguration of these districts. The Appellees here satisfy the standing requirements for presenting a racial gerrymandering claim under *Hays* and *Miller*.

II. BECAUSE TEXAS WAS PREDOMINANTLY MOTIVATED BY RACE IN FORMULATING AND DRAWING RACIALLY "SAFE" DISTRICTS 18, 29, AND 30, STRICT SCRUTINY APPLIES.

The Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking." *Miller*, 115 S. Ct. at 2482. In *Shaw*, this Court reaffirmed that equal protection extends to state redistricting, and prohibits a state from using

"race as a basis for separating voters into districts." *Miller*, 115 S. Ct. at 2485. "Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools . . . , it may not separate its citizens into different voting districts on the basis of race." *Id.* (citations omitted).

This is one of the cases where, as the *Shaw* Court accurately predicted, it is "not . . . difficult at all" to show that strict scrutiny applies. *Id.* at 2826. (In fact, the Department of Justice refuses even to argue that strict scrutiny is inapplicable here.) Although HB 1, like all redistricting legislation, is nominally race-neutral, the direct and indirect evidence in this case overwhelmingly establishes that Texas "segregate[d] the races for purposes of voting, without regard for traditional districting principles." *Shaw*, 113 S. Ct. at 2824. Plaintiffs have shown "through circumstantial evidence of a district's shape and demographics [and] more direct evidence going to legislative purpose, that race was the predominant factor motivating the [Texas] legislature's decision . . ." *Miller*, 115 S. Ct. at 2488.

Presciently applying *Miller's* "predominant factor" test, the District Court found that "the [Texas] legislature's intent was proven directly, through testimony of legislators, the Section 5 preclearance submission, and the use of racial data on the REDAPPL system, as well as inferentially from the makeup of the districts themselves." *Vera*, 861 F. Supp. at 1339 n.47. This determination was not clearly erroneous. Therefore, HB 1 must be subjected to "the same close scrutiny that [the Court] give[s] other state laws that classify citizens by race," and may be upheld only if it is "narrowly tailored to further a compelling state interest." *Shaw*, 113 S. Ct. at 2825; *see also Miller*, 115 S. Ct. at 2482.

A. There Is Overwhelming Direct Evidence That Texas Subordinated All Other Concerns to Its Predetermined Goal of Creating Single-Race Majority Districts.

The testimony of Texas officials in this action, in *Terrazas v. Slagle*, and Texas's own *Narrative* prove that the Texas

"legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller*, 115 S. Ct. at 2481. As the direct evidence establishes, all other considerations took a back seat to overtly racial motivations. *Vera*, 861 F. Supp. at 1338 (rejecting socioeconomic, geographic and other explanations because there is no evidence that such information was relied upon by the legislature, and these assertions are "not persuasive as an explanation for the boundaries of District 30.").

1. Texas Decided To Draw CDs 18, 29, And 30 Along Racial Lines From the Very Beginning Of The Redistricting Process

As discussed above, the fundamental premise of the 1991 congressional reapportionment process was to create selected, safe, single-race majority-minority districts. *See* pp. 8-13, *supra*. "Newspaper articles appearing statewide before and during the redistricting process confirm the view that the Legislature had early on agreed that Dallas County would get a new minority — namely African-American — district." *Vera*, 861 F. Supp. at 1319 n.29. Similarly, Texas's stated goal in Houston was the "maximization of minority voting strength for this geographic area." *Narrative*, J.A. 110.

Despite fierce pressure from House incumbents concerned about their reelection prospects, Texas never wavered from the "underlying assumption" that CDs 18, 29, and 30 would be single-race majority districts. *See* Reynolds Deposition, 6/17/94 Tr. at 111, J.A. 488. *See also* Johnson Testimony, 12/12/91 Tr. at 237, J.A. 432; Martinez Testimony, 12/12/91 Tr. at 137, J.A. 417. The districts were drawn accordingly. *See* Map of Texas U.S. Congressional Districts, 103rd-104th Congresses, PL. Ex. 34(B)(1), J.A. 144. While incumbents may have been allowed to influence the district lines at the margins, any attempt to remove a minority voter from one of the proposed minority districts was

premised upon a corresponding (and generally better performing) minority voter being placed into the single-race majority district.[24]

Forcing incumbents to settle for the nonperforming minorities, while preserving the performing minorities for the racially safe districts, powerfully demonstrates Texas's *primary* motivation. *Vera*, 861 F. Supp. at 1341. In Texas, incumbency protection was clearly a secondary goal to the creation of new districts in which a single racial bloc could safely choose the elected representative. But to the extent that Texas sought to achieve other goals, the battle over these minorities in the absence of voter data illustrates how race was used as a tool in redistricting.

2. Texas's Own Districting Officials Confirmed That Creating Racial Districts Was Texas's "Principal" and "Top" Concern

On several occasions in this action and in the *Terrazas v. Slagle* litigation, the Texas officials who were primarily responsible for redistricting conceded that race was the primary motivating factor in the redistricting process. For example:

- Congresswoman Johnson admitted that her "principal goal" was the creation of safe African-American districts generally and in Dallas County in particular. Johnson Testimony, 12/12/91 Tr. at 231-33, J.A. 426-28.

- Representative Blair testified that the shape of District 30 was the result of efforts "to find stable areas of Black voters." Blair Testimony, 12/12/91 Tr. at 109, J.A. 411.

- Under cross examination at trial, Christopher Sharman admitted that race was a "top" factor in the redistricting process. "[i]t was one of the major reasons." Sharman Testimony, 6/30/94 Tr. at 108, J.A. 522.

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[24] For example, in Dallas, Eddie Bernice Johnson admitted that incumbents were only allowed to "capture" minority voters if better "performing" minority voters were first placed into CD 30. Johnson Testimony, 12/12/91 Tr. at 234-35 & 248-49, J.A. 429-30 & 435-36; *see also* DOJ Brief at 9, 11.

- Carl Reynolds admitted that creating three new minority districts "was an underlying assumption in all [of Texas's] work." Reynolds Deposition, 6/17/94 Tr. at 111, J.A. 488.

With such concessions by Texas officials, the district court was easily able to find the record "replete with proof that the legislature intended to devise four majority-minority Congressional seats." *Vera*, 861 F. Supp. at 1337.

B. The Districts' Bizarre Shapes and Precise Racial Cuts, As Well As Texas's Disregard For Traditional Districting Principles, Demonstrate That Texas Was Primarily Motivated By Race In Drawing CDs 18, 29, And 30

An examination of the maps and a glance at the number of split precincts proves inferentially what the testimony proves directly: that Texas subordinated all other traditional districting principles to its overriding racial goals. The evidence establishes that the overall make-up of these districts can only be explained based on the race of their inhabitants.[25]

The bizarre shapes of CDs 18, 29, and 30 thus provide "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was [the] legislature's dominant and controlling rationale in drawing district lines." *Miller*, 115 S. Ct. at 2480-81. Texas has "concentrate[d] a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Shaw*, 113 S. Ct. at 2827. On this basis alone, Appellees meet their burden of presenting *prima facie* evidence that Texas engaged in racial gerrymandering. *See Shaw v. Hunt*, 861 F. Supp. at 430-31, 450 n.44.

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[25] Plaintiffs need not prove that every point on the district's borders is based solely on race — only that the predominant motivation for the district's make-up was racial. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (plaintiff not required to show that the challenged action "rested solely on racially discriminatory purposes . . . proof that a discriminatory purpose has been a motivating factor in the [legislature's] decision [is sufficient]"); *Hays v. State of Louisiana*, 839 F. Supp. 1188, 1202 n.46 (W.D.La. 1993), *vacated on other grounds*, 114 S.Ct. 2731 (1994).

The shapes of the challenged districts are "so contorted as to permit no other conclusion than that [they were] drawn along racial lines . . . those lines are clear — if circumstantial — evidence that the legislature 'purposefully distinguish[ed] between voters on the basis of race.' " *Johnson v. Miller*, 864 F. Supp. 1354, 1369 (S.D. Ga. 1994) (quoting *Shaw v. Reno*, 113 S. Ct. at 2826), *aff'd*, 115 S.Ct. 2475 (1995).

1. CDs 18, 29, And 30 Are Among The Most Bizarrely Shaped Congressional Districts In The Country And Are Extraordinarily Non-Compact And Non-Contiguous

CDs 18, 29, and 30 are among the least compact congressional districts in the United States. Specifically, CDs 18 and 29 have the least regular borders in the Nation. Pildes & Niemi *supra* note 13, at 565 (ranking CDs 18 and 29 as tied for first with one other district as those with the least regular borders in the country).[26] Texas CD 30 is similarly determined to be among those districts with the least regular borders. *Id.* In addition, CDs 18, 29, and 30 are well below the national median when measuring compactness. *Id.*[27]

"The result of this line drawing appears utterly irrational — Unless one factors in the overlap between these districts and the racial makeup of their underlying populations." *Vera*, 861 F. Supp. at 1340. In fact, on several occasions during cross-examination, Christopher Sharman admitted that district lines which he had previously characterized as being drawn for political purposes were inconsistent with the maps of voter registration, but were consistent with the racial demographics of the region.[28]

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[26] For a description of the means by which compactness is measured and the scores of these districts, *see* Appellees' Motion to Affirm at 18 n.24.

[27] That a district is literally contiguous is irrelevant. A state can draw a contiguous district around any group of voters, no matter where each voter lives. *See Marylanders for Fair Representation, Inc. v. Schoefer*, 849 F. Supp. 1022, 1052 n.38 (D. Md. 1994).

[28] *See, e.g.*, Sharman Testimony, 6/30/94 Tr. at 114, J.A. 529 ("Yes, we picked up [precinct] 203 primarily because it had Hispanics"); *id.* at 117, J.A. 531-532.

In District 18, for example, many narrow corridors, wings or fingers reach out to enclose Black voters while excluding Hispanic "residents" from the "many narrow corridors." Pildes & Niemi, at 556. District 29's border is similarly characterized by fingers reaching out to enclose Hispanics.

Texas contends that the bizarre shape of CD 30 in Dallas County is the result of trading Democratic voters among powerful Democratic incumbents. *See* Texas Brief at 14. This argument is not supported by either the maps or the trial testimony. For example, a close examination of the "tendril" that reaches into Collin county shows that the boundaries of CD 30 perfectly encompass the minority population (*see* Pl. Ex. 34H17, attached hereto), even though several precincts in that area contain *Republican* majorities. (*See* Attachment State's Ex. 9B, attached hereto.)

Moreover, in the *Terrazas* litigation, then-state Senator Johnson testified that the "fingers" of CD 30 that extended into "north Dallas County, and even into southern Collin County[,]" did so in an effort to "bring into the district" "black migration areas." Johnson Testimony, 12/12/91 Tr. at 234-35, J.A. 430; *see also id.* at 248, J.A. 435. Christopher Sharman admitted that race was "more of a factor" in District 30's encroachment into Collin County. Sharman Testimony, 6/30/94 Tr. at 117, J.A. 532. Based on this evidence, the district court properly ruled that race, not incumbency protection, was Texas's primary motivation in creating CD 30. *Vera*, 861 F. Supp. at 1339.[39] This determination was not clearly erroneous.

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[39] The United States urges this Court to accept Christopher Sharman's testimony that, despite the lack of information about political affiliation below the precinct level, he determined the partisan makeup of these areas by "driving through" them looking, in the summer of 1991, for Ann Richards campaign signs. *See* DOJ Brief at 5. Ms. Richards was elected Governor of Texas in November of 1990. On cross-examination, Mr. Sharman conceded that Ann Richards campaign signs would have been difficult to find by the summer of 1991. He offered, however, that it "[c]ould have been Dukakis" signs for which he was looking. *See* Sharman Testimony, 6/30/94 Tr. at 81-82, J.A. 519.

Similarly, a review of the Harris County maps and testimony elicited at trial reveal that District 18 and 29's precise cuts are along racial and not political lines. *See* Pl. Ex. 34H8 & 34H49; State's Ex. 9A(1) (attached hereto). For example, Roman Martinez testified that, in Harris county, "it was particularly necessary to split VTDs in order to capture pockets of Hispanic residents for the new district." *Vera*, 861 F. Supp. at 1340-41; *see also supra note* [8] (Sharman Testimony).

The Appellants urge this Court to ignore the lack of compactness in assessing whether strict scrutiny applies; instead, they repeatedly denigrate as subjective and unduly activist a judicial inquiry into whether districts are compact. The federal courts have been undertaking such an analysis for years, however, in the context of Section 2 claims under the Voting Rights Act, with reasonably predictable and consistent results. *See, e.g., Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993). Moreover, given the fundamental role that geography plays in our politics, and in creating real communities of interest, ignoring the lack of compactness would be closing one's eyes to critical evidence that non-traditional, constitutionally improper criteria were used to create these congressional districts. *See Vera*, 861 F. Supp. at 1334 n.43; *see also Shaw v. Hunt*, 861 F. Supp. at 430-31 & 450 n.44.

Alternatively, the State and Lawson/Reyes Intervenors essentially contend that any district drawn within an urban area is sufficiently compact. This position is untenable. If anything, the urban context of these districts provides additional evidence of impermissible racial gerrymandering. As the district court below stated,

> all parties and their expert witnesses agreed, compactness must be a relative measure for Legislative districts. . . . In a major urban county, compactness makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when viewed in terms of a city's or county's neighborhoods, geopolitical subdivisions, and business location. Adjusting the sense of compactness to the complexity and population density of the urban landscape demonstrates that Districts 18 and

> 29 are not compact at all. Their contorted shapes are the antithesis of compactness.

Vera, 861 F. Supp. at 1341.

Racial gerrymandering is as offensive in an urban context as it is in a rural one. Redistricting can do violence to existing political subdivisions even when the district is entirely within one large political subdivision, such as a county. *See, e.g., Growe*, 113 S. Ct. at 1083-85; *Gomillion v. Lightfoot*, 364 U.S. at 341. Thus, the extraordinarily non-compact natures of CDs 18, 29, and 30 strongly suggest that Texas has engaged in invidious discrimination in formulating its reapportionment plan.

2. CDs 18, 29, and 30 are Constructed Block By Block Along Precise Racial Lines

As the *Miller* court emphasized, it is not just the bizarre shape of a district, but also the precision of its racial cuts, that demonstrate that race was the primary factor in constructing the district. In Texas, as in Georgia, "when [the districts'] shape[s] [are] considered in conjunction with [their] racial and population densities, the story of racial gerrymandering seen by the District Court becomes clearer." *Miller*, 115 S. Ct. at 2489.

> [A]ll one must do is take a . . . map of the State of [Texas] shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of [Texas] and see how well those lines adequately reflect[] black voting strength.

Johnson v. Miller, 864 F. Supp. at 1377. *See* Attachments. Thus, it is not just a district's appearance, but its "appearance in combination with certain demographic evidence" that give rise to an equal protection claim. *Miller*, 115 S. Ct. at 2486.[30]

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[30] The Lawson/Reyes Appellees criticize the district court for "ignoring the highly irregular shapes of majority-white congressional districts" while invalidating CDs 18, 29, and 30. *See* Lawson/Reyes Brief at 37. Yet, even assuming that certain of Texas's majority-Anglo districts are bizarrely shaped, the absence of precise racial cuts corresponding to the bizarre shapes suggests that factors other than race were at work in the formation of these districts.

The Lawson/Reyes Intervenors also contend that CDs 18, 29, and 30 are "integrated," not "segregated" districts. Lawson/Reyes Brief at 15 n.30. In support of this contention, Lawson/Reyes stress that seven Texas congressional districts are more than 80% Anglo. *Id.* This argument is specious. Four of the six Anglo-dominated districts abut Districts 18, 29, or 30, and thus were drained of their multiracial character as a result of Texas's race-based districting. *See* PL. Ex. 34(B)(1), J.A. 144. Such redistricting plans sap these districts of their minority voting strength, "leaving elected officials in these districts with little reason to represent minority viewpoints." Brief of *Amicis Curiae* on behalf of Craig Washington, *supra* page 29, at 16.

As discussed above, and as the attached maps reveal, the districts' outer boundaries do not follow either natural geographical features or existing political boundaries. *See* pp. 13-17, *supra*. Rather, they zig-zag, widen and narrow with geographic irrationality but racial precision. The borders are explainable by one factor and one factor only — the race of the residents who are included and excluded from the districts. *See Vera*, 861 F. Supp. at 1323, 1336, & 1339-40. The high correlation between the district lines and the racial populations is itself sufficient to demonstrate that race was Texas's predominant motive in redistricting.

3. The Districts Fail To Respect Existing Political Subdivisions And Established Communities Of Interest

CDs 18 and 29 divide 16 municipalities, while CD 30 splits 21.[31] Plainly, these districts fail to accommodate existing political subdivisions. Although the Appellants now seek to describe similarities among the inhabitants of these bizarre districts, *see* Texas Brief at 20-21 and Lawson/Reyes Brief at 11-14, the lower court expressly found that these considerations were not before the legislature, and rejected *post hoc* attempts to provide

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[31] *See* Report of Districts Showing Cities and Census Designated Places by District and by County, PL. Ex. 34T; *see* Appellees' Motion to Affirm, attachments 1 and 5.

alternate explanations for these district lines. *Vera*, 861 F. Supp. at 1323. Again, this determination was not clearly erroneous.

In fact, these districts violate traditional districting principles even under the standards employed by the dissenters in *Miller*. Justice Ginsburg urged that because the district at issue in *Miller* largely followed precinct lines, it was drawn consistent with traditional districting principles. *See Miller*, 115 S. Ct. at 2503 n.8 (Ginsburg, J., dissenting). Yet, Texas's redistricting plan splits an extraordinary number of precincts. *See* pp. 14-17, *supra*. Then-state Senator Johnson confirmed this disregard for political subdivisions when she explained that she was under the (mistaken) impression that "we saw in the Law where it prohibited using political subdivisions as a barrier." Johnson Testimony, 12/12/91 Tr. at 236, J.A. 431.

These split precincts provide not only some of the best evidence that Texas was driven by race in creating CDs 18, 29, and 30, but are also the cause of many of the most severe injuries to the political process done by the State's racial gerrymandering. *See Vera*, 861 F. Supp. at 1334 n.43 & 1339.

C. Regardless Of Its Motivation, Race-Conscious Government Decision-Making Triggers Strict Scrutiny

"A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw*, 113 S. Ct. at 2825 (1993) (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979)). Neither of the two justifications proferred by the Appellants — that the racial classifications are benign or that they are justified by incumbency protection — are sufficient to evade strict scrutiny.

1. Racial Classifications, Even Allegedly "Benign Ones," Are Inherently Suspect.

Texas's race-based districting must be subjected to strict scrutiny. In *Gomillion v. Lightfoot*, 364 U.S. 339, this Court properly held that the Fourteenth Amendment precluded Alabama from constructing an "uncouth" twenty-eight sided city map of Tuskegee in order to exclude African-Americans. Here, Texas has created far more "uncouth" districts in order to

include African-Americans or Hispanics, and to exclude other racial groups. Just last Term, this Court reaffirmed that "the level of scrutiny [under the Equal Protection Clause] does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)). The Equal Protection Clause thus requires that, as in *Gomillion*, these racially constructed districts be strictly scrutinized.

Appellants claim that this case is different, arguing that here the "fencing in" is being done at the behest of minority groups. As this Court has held, however, "the creation of majority-minority districts [ ]does not invariably minimize or maximize minority voting strength"; in fact, "[c]reating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominately white districts." *Voinovich v. Quilter*, 113 S. Ct. at 1156. Realizing this, not all African-Americans or Hispanics, as opposed to African-American and Hispanic politicians, favor this kind of "preference." *See, e.g.*, Swain, *Black Faces, Black Interests* ix, 198-205, 207. In addition, constitutional doctrines do not turn on the supposed desires of the individuals who may benefit from, or be burdened by, a racial classification.

In any event, this Court has now conclusively established that even purportedly benign racial classifications must be subjected to strict scrutiny because "'it may not always be clear that a so-called preference is in fact "benign."' *Adarand*, 115 S. Ct. at 2100 (citations omitted). Increasingly, so-called "benign" racial classifications are being viewed as a "contradiction in terms. . . . To the person denied an opportunity or right based on race, the classification is hardly benign." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting). Regardless of their race, the plaintiffs in this action are entitled to equal protection under the law. Accordingly, CDs 18, 29, and 30 must be subjected to strict scrutiny.

2. Protecting Incumbents By Assigning Voters to Congressional Districts Based on Race Is Subject to Strict Scrutiny

The lower court properly determined that Texas's primary motivation in drawing CDs 18, 29, and 30 was creating non-compact single-race majority-minority districts. *See Vera*, 861 F. Supp. at 1334. Indeed, Texas has offered no other explanation for the racially dominant nature of these districts. And even if Texas's motivation in establishing the precise boundaries was to protect incumbents, the state's use of race to accomplish its goal requires the strict scrutiny of this Court. As the district court said: "The State cannot have it both ways. It cannot say that African-American voters are African-American when they are moved into District 30, but they are merely 'Democrats' when they are deliberately placed in a contiguous district for the purpose of bolstering the re-election chances of other Democrats." *Id.* at 1338-39.

Thus, the best constitutional face the State can put on its argument is that Texas served the goal of incumbency protection by using "race as a proxy." *Miller*, 115 S. Ct. at 2487. But both *Miller* and *Shaw* foreclose Texas's essential argument that it may assume, without evidence, "that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw*, 113 S. Ct. at 2827; *see also Miller*, 115 S. Ct. at 2486. If not *per se* unconstitutional, such race-based allocation and segregation of voters to advance the reelection interests of incumbents in adjoining districts must be subjected to the most careful scrutiny.[8]

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[8] *United Jewish Organizations of Williamsburgh ("UJO") v. Carey*, 430 U.S. 144 (1977), is inapposite because here Texas was under no legal compulsion to draw the districts along racial lines as it did. Moreover, *UJO* involved the drawing of compact, majority non-white districts. Thus, unlike the case here, race did not override all traditional districting considerations.

What is more, Texas's argument that incumbents may be protected by racial gerrymandering proves too much: a state may not protect incumbents through unconstitutional means. The poll tax and white primary, both of which are part of Texas's unfortunate history of racial discrimination, *see, e.g., Smith v. Allwright*, 321 U.S. 649 (1944) (white primary), and *Texas v. United States*, 384 U.S. 155 (1966) (per curiam) (poll tax), protected incumbents. They are unconstitutional nonetheless.[33]

Essentially, the State and Lawson/Reyes Intervenors contend that the existence of an additional, non-racial justification of incumbent protection permits Texas to segregate voters by race without being subjected to strict scrutiny. This sweeping contention, if accepted, would negate all *Shaw* claims, as any state "could always trot out some other traditional districting principle [as incumbency protection was here] minimally served by the [district] shape in question." *Johnson v. Miller*, 864 F. Supp. at 1374 (citation omitted).[34] If all a state had to do to justify race-based redistricting was show that district borders also were responsive to political concerns, no voter could ever successfully challenge racial redistricting. *Miller* and *Shaw* require that this argument be rejected.[35]

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[33] Recognizing the inappropriate nature of Texas's incumbency protection argument, the district court observed that "incumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering." *Vera*, 861 F. Supp. at 1336.

[34] Under the State's view, for example, any nominally contiguous district would defeat a *Shaw* claim. A state could always show that it had taken at least one other factor — contiguity — into account. *See also Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994).

[35] The term "incumbent protection" has been consistently misconstrued by the Appellants in this case. This Court has never condoned incumbent protection in which "the representatives have selected the people," instead of "the people select[ing] their representatives," *Vera*, 861 F. Supp. at 1334, as a legitimate — let alone compelling —redistricting criterion that would justify an invidious racial classification. *See also* Appellees' Motion to Affirm at 22-24.

III. TEXAS DID NOT HAVE A COMPELLING GOVERNMENTAL INTEREST IN RACIALLY GERRYMANDERING DISTRICTS 18, 29, AND 30

Given that Texas constructed CDs 18, 29, and 30 along racial lines, HB 1 can only be upheld upon an "extraordinary justification." *See Shaw v. Reno*, 113 S. Ct. at 2825. While strict scrutiny is not "fatal in fact," *Adarand*, 115 S. Ct. at 2101 (citation omitted), "[t]o satisfy strict scrutiny, the State must show that [the law it defends] furthers a compelling state interest by the least restrictive means practically available." *Bernal v. Fainter*, 467 U.S. 216, 227 (1984).

HB 1 does not survive strict constitutional scrutiny. Even assuming that compliance with the Voting Rights Act can constitute a sufficiently compelling state interest to justify race-based districting, the Voting Rights Act did not require Texas to create any of these racial districts. Moreover, Texas cannot establish any other compelling governmental interest to draw congressional districts along racial lines. Accordingly, HB 1 must be invalidated.

A. The Voting Rights Act Did Not Require Texas to Construct Three Single-Race Majority Districts

As the Court made clear last Term, "Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the constitution.'" *Miller*, 115 S. Ct. at 2493 (quoting *South Carolina v. Katzenbach*, 383 U.S. at 326).[36] The Voting Rights Act does not trump the Constitution; thus, any race-based decisionmaking that the Voting Rights Act may require must be precisely co-extensive with the constitutional requirement that such decisions be narrowly tailored to serve a compelling governmental interest.

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[36] The Court has never squarely addressed the constitutionality of amended Section 2. *See Johnson v. DeGrandy*, 114 S. Ct. 2647, 2665 (1994) (Kennedy, J., concurring). Because the Voting Rights Act clearly did not require Texas to draw these bizarre, single-race majority-minority districts, this Court need not address the constitutionality of Section 2 in this case either.

The State bears a heavy burden of justifying racial districts. *See Shaw*, 113 S. Ct. at 2825, 2829-32. This burden is not satisfied merely by showing that such districts are permitted by the Voting Rights Act; a state must show that race-based districting was *required* by the Voting Rights Act, and that the districts are consistent with the Constitution. *See, e.g., Johnson v. Miller*, 864 F. Supp. at 1381.

Even if this Court were to entertain Texas's *post hoc* justification for its race-based decision-making, Texas cannot demonstrate a remedial interest here in constructing bizarre, non-compact, single-race majority districts. These districts were not required to avoid retrogression under Section 5 of the Voting Rights Act. Nor are they compelled by Section 2, which, at most, may require the creation of compact districts. The admittedly non-compact nature of these districts establishes that they are not required by the Voting Rights Act.

1. These districts were not necessary to avoid retrogression.

Texas has conceded that Section 5 of the Voting Rights Act, which requires a state only "to preserve extant 'minority' districts," *Vera*, 861 F. Supp. at 1342 n.54 (citing *Beer*, 425 U.S. 130, 141 (1976)), "did not require the creation of new minority Districts 29 and 30." *Id.* Nor did Section 5, which guards against "*retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer*, 425 U.S. at 141 (emphasis in original), require Texas to construct CD 18 along racial lines.[37]

This Court has never analyzed retrogression under Section 5 where a single minority group constituted less than a majority. See, *e.g.*, *Miller*, 115 S. Ct. at 2481; *Beer v. United States*, 425

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[37] Texas cannot show that Districts 18, 29, and 30 were necessary under the "purpose prong" of Section 5. That component of Section 5 is violated only if "the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Beer*, 425 U.S. at 141. There is no evidence that Texas purposefully discriminated against minorities in enacting HB 1. *See Terrazes*, 821 F. Supp. at 1162.

U.S. at 141. Because African-Americans never made up a majority of CD 18, Section 5 should not be read as requiring the preservation of CD 18 as a 41% Black opportunity district to avoid retrogression. *See* Texas Brief at 25-28.

In addition, it is difficult to see the logical stopping point if the non-retrogression principle were extended to non-single-race majority-minority districts. Theoretically, Section 5 could then apply to every state and local district in all the covered jurisdictions, no matter how small the minority population is in each district. Requiring states to preserve the pre-existing minority percentages in all of the districts within their borders — regardless of how small those percentages were — would make it virtually impossible for states to redraw their district boundaries.[38]

In sum, Section 5 did not require Texas to create any of the race-based districts at issue.[39]

2. Section 2 of the Voting Rights Act Did Not Require Texas to Racially Gerrymander CDs 18, 29, and 30

This Court has rejected the use of race in governmental decisionmaking unless the governmental actor determines in

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[38] Texas contends that Section 5 required the state to "maintain CD 18 as an African-American opportunity district" even though large numbers of minorities during the 1980s moved out of downtown Houston. *See* Texas Brief at 27. But Texas cites absolutely no authority for the proposition that Section 5 requires states to preserve minority districts when the minority populations move away. To the contrary, states are not obligated to maintain minority districts where the minority population within the district has moved away. *Cf. Pasadena v. Bd. of Educ.*, 427 U.S. 424, 435-36 (1976).

[39] Even if Section 5 were to apply to CD 18, it certainly did not require Texas to *increase* the black population in CD 18 from 41% to over 50% to avoid retrogression. Texas itself stresses that prior to HB 1, African-Americans were able to elect their candidates of choice in CD 18 100% of the time for over two decades. *See* Texas Brief at 25 n.21 (describing CD 18's "distinguished place in the history of African-American politics in Texas"). Texas's unfounded claim that this hike in African-American voting strength is necessary due to the breakdown in cross-over voting between Blacks and Hispanics lacks factual and legal support.

advance that only the use of race can remedy previously identified racial discrimination. *See City of Richmond v. Croson*, 488 U.S. 469, 500-01, 504-06 (1989). Here, Texas failed even to ask the essential questions. It did not first determine whether its traditional reapportionment process would have produced racially discriminatory results, thus violating the Voting Rights Act. It did not assess whether there is any sufficiently compact and cohesive group of protected minorities that is subject to bloc voting. Nor did it assess whether the politicial process is closed to such individuals. Had it done so, Texas would have recognized that no problem exists that necessitates the use of race as a remedy.

Instead, Texas decided at the outset of the redistricting process to construct three single-race majority districts in Dallas and Houston. Such an approach violates the Constitution. When a state "chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals . . . A governmental actor cannot render race a legitimate proxy for a particular condition *merely by declaring that the condition exists.*" *Id.* at 500 (emphasis added) (citations omitted). *See also id.* at 504-06. Rather, race-based actions must be based on "a correct reading of the [Constitution or] the statute." *Miller*, 115 S. Ct. at 2490.

Requiring that the State be "right" and not just reasonable is appropriate given the dangers involved in governmental decision-making based on race. *See, e.g., Croson*, 488 U.S. at 493. There is no good-faith exception to the Equal Protection clause. Creating one here would do immeasurable damage to the anti-discrimination principle embedded in the Fourteenth Amendment.

Appellants claim that they should not have to wait to be sued before taking race into account, and that the State should not be forced to make a case against itself. *See* Texas Brief at 35-36. Although a state may not be required to wait to be sued before remedying a constitutional or statutory violation, Texas cannot possibly be "correct" in concluding that race-based districting is necessary if it does not first try to redistrict according to its customary process. Only if the results of that process reveal

racially discriminatory results could a State begin to make a case that it was necessary to use race to remedy identifiable instances of racial discrimination.[40] Nor can the State rely on outside actors, such as the Department of Justice, and then claim a good-faith belief that race-based decision-making was necessary.[41]

Insisting that states make a genuine, good-faith effort to assess whether a problem exists before using race to remedy that problem not only comports with this Court's caselaw and common sense; such a requirement also gives guidance to state legislatures and would help courts assess where their intervention may be warranted.

Because Texas never undertook such an effort, Texas cannot possibly show that Section 2 required the construction of these bizarre, single-race majority districts. At most, Section 2 may compel the creation of *compact* majority-minority districts. Because these districts are not compact, and the *Gingles* preconditions are not otherwise present, Section 2 is irrelevant.

Moreover, Texas cannot show that "under the totality of the circumstances," Hispanics and African-Americans in modern Texas have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C. Section 1973b. There is simply no proof that these minorities have been "essentially shut out of the political process."[42] As a result, Section 2 cannot justify these race-based districts.

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[40] Plaintiffs' expert (Dr. Weber) drew hypothetical congressional districts in accordance with traditional districting principles that did not take race into account. *See* Weber Testimony, 6/28/94 Tr. at 133-34.

[41] *See Miller*, 115 S. Ct. at 2491 ("We do not accept the contention that the State has a compelling interest in complying with whatever [Voting Rights Act] preclearance mandates the Justice Department issues."); *see also Hays I*, 839 F. Supp. at 1217.

[42] *Cf. Davis v. Bandemar*, 478 U.S. 109, 139 (1986) (describing vote-dilution standards under the Fourteenth Amendment); *see also id.* at 151-52 (O'Connor, J., concurring in the judgment) (same).

a. The *Gingles* "Pre-conditions" Are Absent

The *Gingles* "preconditions" "never can be assumed, but specifically must be proved in each case." *Shaw*, 113 S. Ct. at 2830 (citing *Growe v. Emison*, 113 S. Ct. 1075, 1076 (1993)). Texas has failed to prove that all three *Gingles* "preconditions" are present. None of these bizarre, admittedly non-compact districts satisfy the first *Gingles* factor — that each minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50-51.[43] Moreover, there is ample evidence that the third *Gingles* factor — bloc voting by Anglos — is absent in both Dallas and Houston.

(1) Compactness.

The Appellants admit, and an independent review of Harris County's Black and Hispanic residential housing patterns confirms, that neither CD 18 nor CD 29 satisfies the first *Gingles* precondition — *i.e.*, compactness. The United States acknowledges (as does Texas) that racially integrated housing patterns in Harris County made it impossible for Texas to draw compact majority-Black and majority-Hispanic congressional districts in Houston at the same time. *See* pp. 13-14 *supra*. Thus, Texas was only able to create a Black- and an Hispanic-majority district by drawing extraordinarily non-compact districts that split hundreds of neighborhoods and precincts and splintered established communities of interest. *See* PL. Exs. 34(B)(1), 34(H)(8), 34(H)(9), J.A. 144, 151-52; *see also* pp. 14-15, *supra*. Similarly, the district that was drawn in Dallas was so extraordinarily non-

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[43] The Lawson/Reyes Interveners contend that the first *Gingles* factor is satisfied so long as "reasonably compact" districts are drawn "with a sufficiently large minority population to elect candidates of its choice" — even if the minority population does not constitute a majority. *See* Lawson/Reyes Brief on the Merits at 48. This contention runs counter to lower federal court rulings strictly requiring minorities to constitute a majority in a compact district. *See, e.g.*, *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654 (N.D. Ill. 1991) (eliminating the *Gingles* majority-minority requirement would "likely open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes").

compact that it could not possibly be required by Section 2, consistent with the Constitution. *See* PL. Exs. 34(B)(1), 34(B)(3), 34(D)(2), J.A. 144, 146, 148; *see also* pp. 15-17, *supra*.

Appellants seek to circumvent the impossibility of drawing compact single-race majority districts in Harris County and Dallas counties by arguing that *Gingles* only requires a determination of whether a compact majority-Black or a majority-Hispanic district could be drawn theoretically in isolation. *See* Texas Brief at 28-29.[44] This points out the limits of applying conventional Section 2 analysis in tri-racial circumstances. *See DeGrandy*, 114 S. Ct. at 2663.

More importantly, to contend that the compactness requirement may be abandoned in actual fact because a compact African-American and a compact Hispanic district may be drawn — although not both at the same time — is illogical and wrong. Here, as in all racial gerrymandering cases, because the State contends that Section 2 required it to draw *these* districts, the *Gingles* analysis must necessarily turn on the districts the State actually drew. It would be illogical to make a hypothetical assessment about what a Section 2 district might look like. Such a hypothetical analysis would have nothing to do with whether the districts as drawn were required by the Voting Rights Act.

"The first *Gingles* criterion is that the minority population are sufficiently numerous and geographically compact to form a majority in a single-member district . . . [and] *presupposes legislative districts that have geographic integrity and satisfy traditional districting standards.*" *Vera*, 861 F. Supp. at 1342-43 n.54 (citing *DeGrandy*, 114 S. Ct. at 2655) (emphasis added). Because none of the districts at issue is a compact

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[44] Appellees seriously doubt that a compact Hispanic-majority district could be created in Harris County under any circumstances, even if no Black-majority district were drawn. *See* Map of Harris County Hispanic Population Distribution by VTD, Plan C657, PL. Ex. 34H9, J.A. 152 (showing dispersed Hispanic housing patterns). Appellees' doubts are reasonable, considering that 45.8% of all Hispanics of voting age in Houston are non-citizens. *See Campos*, 1995 WL 478151 at *3.

majority-minority district, the first *Gingles* "precondition" is absent.[45]

(2) Racial Bloc Voting

The Fifth Circuit recently ruled *en banc* that, as a matter of law, the third *Gingles* precondition — racial bloc voting by Anglos — was not present in Harris County during the 1980s and 1990s. *See League of United Latin Amer. Citizens ("LULAC") v. Clements*, 999 F.2d 831, 883 (5th Cir. 1993) (ruling that "party, not race, was the decisive factor in determining electoral outcomes"), *cert. denied*, 114 S. Ct. 878 (1994). Moreover, just three months ago, the United States District Court for the Southern District of Texas reached the same conclusion. *See Campos v. City of Houston*, 1995 WL 478151 at *4-5 (S.D. Tex. July 31, 1995) (finding that Anglos voted for Hispanics about 50% of the time).[46] Similarly, the Fifth Circuit similarly ruled as a matter of law that there is no racial bloc voting in Dallas County. *LULAC*, 999 F.2d at 877, *cert. denied*, 114 S. Ct. 878 (1994) (finding that white cross-over voting for Black judicial candidates in Dallas County during the 1980s and 1990s was as high as 77% and 61%); *see also* PL. Ex. 14K, J.A. 137. Given the degree of Anglo cross-over voting in Harris and Dallas counties, the third *Gingles* precondition is absent.[47]

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[45] Moreover, there was no evidence in the record that a compact majority-black congressional district *could* have been created in Dallas County. In an effort to show that the first *Gingles* precondition is present, at trial Texas's counsel constructed an allegedly "compact" majority-Black district in Dallas. *See* Map of Dallas County Proposed Congressional Districts, Summary Sheets, State Ex. 12C, J.A. 201. Yet, this district includes several distinct appendages, *id.*, and Blacks do not constitute a majority within it. *Id.* at 202.

[46] *See also* African-American Success in Texas Legislative Districts by Percentage Black, 1983-1992, PL. Ex. 14K, J.A. 137.

[47] Appellants rely on *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990), for the proposition that racial block voting persists in Texas today. *See* Texas Brief at 31. In *Williams*, the court adopted the extreme view that "a minority candidate elected with overwhelming white support — even an excellent at-large member, like Al Gonzalez — does not

(footnote continues)

Moreover, even when a minority group's preferred candidate is defeated, *Gingles* requires proof that a white racial voting bloc systematically denies minorities an opportunity to elect candidates of their choice. *See Gingles*, 478 U.S. at 50-51 (requiring proof that white racial block voting "*usually* [] defeat[s] the minority's preferred candidate") (emphasis added) (citations omitted). Given the degree of racial cross-over voting that takes place in the Texas of the 1990s,

> there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul and trade to find common political ground.

DeGrandy, 114 S. Ct. at 2661.

Because Texas cannot show that the *Gingles* preconditions required it to draw the districts it actually drew, it cannot prove that the Voting Rights Act justifies its race-based determinations.

(footnote continued)

have the confidence of the black or Hispanic communities." *Id.* at 1327. This view is similar to those of certain voting rights scholars who believe that African-Americans who are elected by whites "are typically not 'authentic,' which is to say they are not 'politically, psychologically, and culturally black.'" *Tyranny of the Majority? Taking Issue with Lani Guinier*, The News and Observer, Sept. 17, 1995. This Court has emphatically rejected such a view. *See, e.g., Shaw*, 113 S. Ct. at 2818; *Miller*, 115 S. Ct. at 2485-86.

b. In Modern Texas, Hispanics and African-Americans Are Not Denied An "Equal Opportunity" To "Participate In The Political Process And To Elect Representatives Of Their Choice"

In any event, "under the totality of the circumstances," minorities in modern Texas have not been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C. Section 1973b. Those who drafted the 1982 amendments to the Voting Rights Act emphasized that amended Section 2 "protects the right of minority voters to be free from election practices, procedures or methods, that *deny them the same opportunity to participate in the political process as other citizens enjoy.*" S. Rep. No. 1992, 99th Cong., 2nd Sess. (1982) at 28 [hereinafter 1982 Senate Report] (emphasis added). Senator Dole, who authored compromise Section 2 language that ultimately gained final passage, stressed that under amended Section 2, "the issue to be decided is whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access, whether it is open; equal access to the political process, not whether they have achieved proportional election results.") *Id.* at 233 (Statement of Sen. Dole).[48]

"[N]o supporter of the Dole 'compromise' took issue with this interpretation of the meaning and purpose of the amendment." 1982 Senate Report at 230. In fact, numerous Senators echoed that amended Section 2 was "access-related," as distinct from "outcome-related." Thus, there was a consensus that

> [Amended Section 2 guarantees] voter *access* to the polls. Whether a particular voter does or does not have such access depends upon 'the totality of the circumstances' test — a test that is certainly an implicit ingredient of

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[48] The "Dole Compromise" provided that "nothing in [amended Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1988). *See 1982 Senate Report* at 230 (" 'the compromise provides that the issue to be decided is whether political processes are equally open, thus placing the focus on access to the process, not election results.' ").

> numerous voting rights cases on the books dealing with the question of voter access. *It is a question involving the right to vote not the right of group representation.*

1982 Senate Report at 227 (emphasis added); *see also* 128 Cong. Rec. 14, 316 (1982) (Statement of Sen. Dole).

In construing the reach of amended Section 2, this Court has stressed that "the ultimate right [under] § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *DeGrandy*, 114 S. Ct. at 2658 n.11. Furthermore, in determining whether amended § 2 has been violated, this Court and lower federal courts have required stringent proof that minorities have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." The court must find that minority success "will be highly infrequent under the challenged plan before it may conclude, on this basis alone, that the plan operates to 'cancel out or minimize the voting strength of [the] racial grou[p].'" *Gingles*, 478 U.S. at 99-100 (O'Connor, J., concurring); *Id.* at 98.[49]

Moreover, plaintiffs cannot succeed on a Section 2 claim unless they show that minorities are denied an equal opportunity to participate in the political process *and* (2) to elect representatives of their choice. *Chisom v. Roemer*, 501 U.S. 380, 396-97 (1991). To satisfy the foregoing requirements, Section 2 plaintiffs essentially must show that minorities have been "shut out of the political process." *Davis v. Bandemer*, 478 U.S. at 158.[50]

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[49] *See also id.* at 98 (Section 2 violation depends on " 'strong indicia of lack of political power and the denial of fair representation' ") (O'Connor, J., concurring) (citation omitted); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992) (ruling that even if the three *Gingles* preconditions are present, Section 2 is not violated "if other considerations show that the minority [group] has an undiminished right to participate in the political process.").

[50] Other evidence of Congress's intent relating to the 1982 amendments to the Voting Rights Act confirms that a state's redistricting plan does not violate amended Section 2 unless minorities are effectively "shut out" of

(footnote continues)

In determining whether minority voters are being denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice" under amended Section 2, Congress instructed the state and federal courts to apply the vote-dilution "factors" developed by this Court in *White v. Regester*, 93 S. Ct. 2332 (1973), and by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (1973) ("*White-Zimmer* factors"). 1982 Senate Report at 28-29. Texas cannot establish the existence of these factors. As discussed above:

- In Texas today, minorities are not being denied the right to register, to vote, or otherwise to participate in the political process. *See LULAC*, 999 F.2d at 868 (concluding that minorities "have not established that the effects of past discrimination have hindered their ability to participate in the political process."); *see also* pp. 2-8, *supra* (discussing active minority participation in Texas politics).

- Voting in Texas elections is not racially polarized. *See* PL. Ex. 14K, J.A. 137; *see also Campos*, 1995 WL 478151, *4; pp. 4-5 *supra* (discussing lack of racial bloc voting in modern Texas).

- Texas does not have unusually large election districts, majority-vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against minorities, and Appellants presented no evidence that any such restrictive practices occur in Texas today. *See Minority Analysis* at 2-4 ("rejecting the discriminatory or restrictive practices of [Texas's] past."); *see also LULAC*, 999 F.2d at 853.

(footnote continued)

the political process. *See Voting Rights Act: Hearings on S.53, S.1761, S.1975, S.1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 819-20 (1982) ("Senate Hearings"). *See Also Id.*; at 223 (prepared statement of Sen. Kennedy) (amended § 2 seeks to guarantee that minorities are not "effectively shut out of a fair opportunity [to] participate in the election").

- Minorities are not hindered in their ability to participate effectively in the candidate-selection process. *See id.* at 880 (finding that there are no formal bars to the nominating or slating process); *see also* pp. 17-18 *supra* (minority officeholders played a key role in shaping Texas's redistricting process.).
- Political campaigns have not been characterized by overt or subtle racial appeals. *See LULAC*, 999 F.2d at 879 (finding that "alleged" racial appeals were merely "isolated incidents.").
- Members of minority groups have been elected to public office in the jurisdiction. *See* pp. 5-8 *supra* (summarizing recent minority electoral success).

1982 Senate Report at 28-29 (citations omitted).[51]

Certainly Texas cannot establish that the patently discriminatory practices that the 1982 Senate Report identified as potential violations of Section 2 occur in modern Texas. There is simply no evidence that election officials are making "absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens," that Texas purged voters from its electoral rolls in a discriminatory manner, that "opportunities for re-registration were unduly limited," or that "the information provided [by Texas] to voters substantially misled them in a discriminatory way." 1982 Senate Report at 30 n.119 (citations omitted).[52]

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[51] In addition, as Texas proudly proclaims to the Justice Department, *Minority Analysis* at 1, *see* pp. 2-3 *supra*, there is no evidence of "a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." 1982 Senate Report at 29. The statements from outreach hearings that Lawson/Reyes rely upon as support for their contention that Texas elected officials are insufficiently "responsive" are little more than the gripes that would be directed by any group of occasionally disgruntled voters at *any* representative.

[52] Of course, if a Section 2 plaintiff produces evidence that an electoral scheme was enacted with a racially discriminatory purpose, a Section 2

(footnote continues)

Finally, even without gerrymandering CD 29 as a majority-Hispanic district, Hispanics under HB 1 have more than a proportional number of Hispanic-majority congressional districts. Specifically, Hispanics are single-race majorities in CDs 15, 16, 20, 23, 27, and 28 (five out of 30 or 20%), while constituting only 18.4% of Texas's voting age citizen population.[53] Although proportionality is not "dispositive" in adjudicating vote-dilution claims under Section 2, it "is *always* relevant evidence." *DeGrandy*, 114 S. Ct. at 2664 (O'Connor, J., concurring). Because Hispanics are over-represented under HB 1 even without drawing CD 29 along racial lines, Section 2 in no way required Texas to create CD 29.

The active participation of minorities in all phases of Texas politics — as well as demonstrated minority electoral success — rebuts any contention that Section 2 could have mandated that Texas engage in race-based districting.

B. Interpreting Section 2 to Require "Affirmative Action Redistricting" Would Create Constitutional Concerns

Texas's claim that states may use race affirmatively to gerrymander single-race majority-minority congressional districts without any evidence that minorities are "essentially shut out of the political process" is unconstitutional under this Court's precedents. Although Texas claims to eschew such a goal, its interpretation of the Voting Rights Act — as requiring that

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(footnote continued)

violation can be made out without any need to show that minorities are shut out of the political process. *See* 1982 Senate Report at 67 (noting that plaintiffs will "continue to have the option of establishing a Section 2 violation by proving a discriminatory purpose behind the challenged practice or method"). Thus, if a state insidiously cracked a cohesive, compact minority group, a Section 2 claim could probably be made out even if the minority group were not thereby shut out of the political process. Needless to say, there is no evidence that Texas enacted HB 1 with a racially discriminatory purpose.

[53] *See Plan Analysis Reports System: Plan Citizenship Analysis, Congressional Districts* at 2 (1994).

racially safe districts be drawn wherever possible without a prior determination that minorities are being excluded from the political process — is tantamount to a proportional representation requirement, particularly in light of the non-retrogression requirement of Section 5.

This Court has made clear that if the Voting Rights Act were construed as requiring maximization or proportional representation, it is unconstitutional. As Justice Kennedy recently warned:

> [o]perating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid Section 2 litigation. Likewise, a court finding a Section 2 violation might believe that the only appropriate remedy is to order the offending State to engage in race-based districting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance [under Section 5]. *Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against.*

DeGrandy, 114 S. Ct. at 2666 (Kennedy, J., concurring) (citation omitted) (emphasis added).[54] Because "the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions", *id.* race-based districting is only constitutionally permissible in strictly remedial settings. *See also Croson*, 488 U.S. at 493.

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[54] *See also Johnson v. Miller*, 864 F. Supp. at 1379 ("[t]o erect the goal of proportional representation is to erect an implicit quota for black [and other minority] voters. Far from a compelling state interest, such an effort is unconstitutional.") (citing *Bakke*, 438 U.S. at 307) (Powell, J.); *see also id.* at 1386.

By limiting race-based districting to such remedial circumstances, Section 2 will continue being used as a shield to ensure that minority voting rights are protected, rather than be used as a sword — without any proof that minorities are being excluded from the political process — to affirmatively maximize the number of single-race majority-minority voting districts. "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Miller*, 115 S. Ct. at 2494. Appellants' "affirmative action," non-remedial interpretation of Section 2 should therefore be rejected. *See Vera*, 861 F. Supp. at 1342 n.53.

C. Texas Has Not And Cannot Establish Any Other Compelling Governmental Interest To Engage In Race-Based Districting

This Court should reject Texas's argument that, separate and apart from complying with the Voting Rights Act, it had a compelling governmental interest to create Districts 18, 29, and 30 along racial lines because the districts were necessary to eradicate the effects of past racial discrimination. *See* Texas Brief at 24-25. A compelling state interest in remedying past discrimination does not exist independent of the Voting Rights Act. *See, e.g., Johnson v. Miller*, 864 F. Supp. at 1380.

This Court has only permitted the use of race to remedy demonstrably proven racial discrimination. *See Croson*, 488 U.S. at 500-01 504-06. If a State can demonstrate that its current voting practices are discriminatory — showing that the *Gingles* preconditions are satisfied and that minorities are shut out of the political process — the State has established a section 2 violation and may draw race-based districts to remedy the violation. If it cannot, there is no further room for the use of race. As this Court has often said, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially

classified remedy." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).[55]

Appellants, particularly the Department of Justice, argue that Texas should be trusted to engage in race-based districting even where the Voting Rights Act does not require it to do so, because of Texas's history of racial discrimination and the fact that it has now reformed, and has only the best intentions. *See* DOJ Brief at 32-35. Such an argument turns logic on its head. Past bad actors should not be given special latitude; if anything, they should be more closely scrutinized when they undertake the same activity as before, but this time claiming to do so for a good reason.

In any event, even if eradicating the effects of past racial discrimination could be a compelling governmental interest apart from complying with the Voting Rights Act, the district court below properly found that "[n]o evidence was presented [by Texas] at trial to support this basis for minority districts"; therefore, the court "[did] not consider it further." *Vera*, 861 F. Supp. at 1343 n.53 (rejecting the United States' contention that Texas has a compelling interest to engage in "'affirmative action redistricting'" to eradicate past racial discrimination). The district court's findings of fact are not clearly erroneous. Accordingly, Texas cannot rely on this rationale to justify its race-based reapportionment plan.

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[55] Even if a state did have convincing evidence that remedial action were necessary to remedy specific victims of racial discrimination in voting, the Fourteenth Amendment probably bars states from doing more than what the Voting Rights Act requires in remedying prior discriminatory voting practices. *See Shaw v. Reno*, 113 S. Ct. at 2832 (noting that, in *UJO v. Carey*, "only three justices were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act.") (quoting *UJO*, 430 U.S. at 167-68). *See also Johnson v. Miller*, 864 F. Supp. 1354; *Shaw v. Hunt*, 861 F. Supp 408, 476-495 (1994) (Voorhees, J., concurring in part and dissenting in part) (same).

IV. TEXAS FAILED TO EMPLOY NARROWLY TAILORED MEANS IN CREATING CDS 18, 29, AND 30

Once strict scrutiny applies, it is not sufficient for Texas to prove that its race-based classifications serve a compelling governmental interest. In addition, Texas must prove that its racial classifications are narrowly tailored. "[T]o pass constitutional muster, [state racial classifications] must be 'necessary . . . to the accomplishment' of their legitimate purpose." *Palmore v. Sidoti*, 466 U.S. 429, 432 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964)). This Court has long "recognize[d] the need for careful judicial evaluation to assure that any . . . program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980). "The State has the burden of producing evidence of narrow[] tailoring to achieve its [purported] compelling state interest." *Vera*, 861 F. Supp. at 1342. Narrow tailoring analysis consists of two independent inquiries. First, courts must consider "whether lawful alternative[s] and less restrictive means could have been used." *Wygant*, 476 U.S. 267 at 280 n.6. Second, to be sufficiently narrowly tailored, "the classification at issue must 'fit' with greater precision than any alternative means." *Id.* (citation omitted). *See also United States v. Paradise*, 480 U.S. 149, 199 (O'Connor, J., dissenting) (the states's race-based policy "must fit with greater precision than any alternative remedy"). A precise fit is necessary because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant*, 476 U.S. at 280 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980)).

Because Texas failed to determine which discriminatory districts—if any—its customary congressional reapportionment process would have produced, there is no practical way for

Texas to show that its race-based districting was narrowly tailored to overcoming discriminatory districting.[56] Thus, Texas has not and cannot show that Districts 18, 29, and 30 are narrowly tailored because: (1) Texas created these districts in utter disregard of traditional districting principles, including compactness, contiguousness, and respect for established communities of interest; (2) the districts as drawn do not substantially include the particular minority voters whose constitutional and statutory rights they purportedly protect; and (3) Texas rejected more compact, alternative majority-minority districts. Therefore, CDs 18, 29, and 30 are unconstitutional.[57]

A. Districts 18, 29, And 30 Violate Traditional Districting Principles And Therefore Are Not Narrowly Tailored

Even if a state has a compelling governmental interest to engage in race-based districting, such districting is narrowly tailored only if the state "employ[s] sound districting principles [including] compactness[,]" and if the affected racial group's "residential patterns afford the opportunity of creating districts in which they will be in the majority." *United Jewish Organizations of Williamsburgh ("UJO") v. Carey*, 430 U.S. 144, 167-68 (1977). Here, not only did Texas utterly disregard its own traditional districting principles, but it has sought to create safe, single-race majority districts even though the "residential patterns" do not afford an opportunity to do so in a reasonably compact manner.

By its own admission, Texas departed dramatically from traditional districting principles in constructing CDs 18, 29, and 30.[58]

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[56] *See Croson*, 488 U.S. at 506 (noting that it is "impossible" to assess whether race-based state action is narrowly tailored if it is "not linked to [previously] identified discrimination").

[57] In addition, all of the districts "went beyond what was reasonably necessary to [comply with the Voting Rights Act,]" *Shaw v. Reno*, 113 S. Ct. at 2831.

[58] *See* Texas Jurisdictional Statement at 11 & 6 (Districts 18 and 29); DOJ Brief at 7 ("The Legislature knew it was possible to create a reasonably compact black opportunity district in Dallas County. At least two such plans

(footnote continues)

Moreover, the maps, documentary evidence, and testimony at trial confirm that CDs 18, 29, and 30 are extraordinarily non-compact and non-contiguous, splinter existing political subdivisions, and destroy communities of interest. *See* pp. 13-17, *supra*.

At trial, Texas contended that it "does not have and never has used traditional districting principles such as natural geographic boundaries, contiguity, compactness, and conformity to political subdivisions." *Vera*, 861 F. Supp. at 1333. The district court found that Texas's contention was simply untrue. It found that, in the past, "Texas has not intentionally disregarded traditional districting criteria. A glance at the maps showing the organization of Texas's Congressional districts in 1980 refutes the State's argument that it recognizes no state interest in traditional districting principles." *Vera*, 861 F. Supp. at 1334 (citing Map of Texas Congressional Districts for the 99th-102nd U.S. Congress, PL. Ex. 28A, J.A. 138). The district court's finding that Texas in the past has followed traditional districting principles in congressional reapportionment is not clearly erroneous. Thus, Texas's disregard for such factors establishes as a matter of law that HB 1 is not narrowly tailored.[59]

The requirement that a State take traditional districting principles into account when it draws district lines based on race does not require it to draw one platonically perfect, compact district in order to comply with the narrow tailoring requirement. When the State determines that districts drawn in traditional ways will

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(footnote continued)

were presented to it) (citing the Johnson and Owens-Pate plans); *Vera*, 861 F. Supp. at 1338 (reviewing PL. Ex. 29).

[59] Texas's contention that despite the fact that HB 1 splinters municipalities and precincts, the congressional districts in HB 1 were created consistent with its traditional districting principles directly contradicts representations Texas made in defending its 1971 congressional reapportionment plan in *White v. Weiser*, 412 U.S. 783, 789 (1973). There, Texas contended that the population variations stemmed from Texas's strong state policy of avoiding fragmenting county, municipal, and other political subdivisions. *Id.* at 791. *See also* Texas *Weiser* Brief on the Merits at 75-81. Texas "traditions" seem to change fast.

infringe the rights of individuals who have suffered discrimination in voting, it may have some remedial latitude. *See* Section IV. B., *infra*. A State may not, however, materially abandon traditional districting constraints, and claim that its interest in "fixing" elections gives it *carte blanche* to use race for any purpose that it wishes. Such an argument is inconsistent with the Equal Protection Clause and must be rejected. *See Shaw v. Reno*, 113 S. Ct. at 2831 (Voting Rights Act does not give states "*carte blanche* to engage in racial gerrymandering").

Requiring States to respect traditional districting criteria such as compactness and political subdivisions also helps make the narrow tailoring inquiry judicially manageable. As noted above, federal courts have been evaluating district compactness for years in ruling on Section 2 claims, with reasonably predictable and consistent results. Were States prohibited from taking such criteria into account at all, then there might well be only one ideal district that satisfies narrow tailoring requirements. Such a rule would ill serve the need to afford states some latitude in crafting a remedy. It could also involve courts in unduly academic arguments about which district is "ideal." Conversely, however, requiring some fidelity to traditional districting principles narrows the State's discretion, and ensures that remedial districts do not differ dramatically from other districts in the State.

Finally, Appellants inappropriately raise the Equal Protection Clause in objecting to a requirement that States draw regularly-shaped districts when creating remedial majority-minority districts, but not when drawing non-remedial, Anglo-majority districts. *See* DOJ Brief at 56-58 (contending that the ruling below "requires the State to discriminate against minority incumbents and would-be incumbents"). This contention lacks foundation. First, as demonstrated above, Texas gerrymandered CDs 18, 29, and 30 along precise racial lines; by contrast, the majority-Anglo districts were not constructed along strict racial lines. "[R]acial and ethnic distinctions of any sort are inherently suspect and [call] for the most exacting judicial examination." *Bakke*, 438 U.S. 265, 271 (Powell, J.). Accordingly, not only is it appropriate to insist that

race-based congressional districts are narrowly tailored, it is constitutionally required. Second, permitting states to redistrict without regard for criteria such as compactness and political subdivisions would lead to the result here — the creation of allegedly "remedial" districts that do not address the harm done to individuals who have supposedly been denied the right to vote with their local communities on account of their race. *See* Section IV. B., *infra*.

Because Texas entirely ignored traditional districting criteria in creating CDs 18, 29, and 30, HB 1 is not narrowly tailored.

B. There Is An Insufficient Nexus Between The Voters Included In CDs 18, 29, and 30, And The Particular Minority Voters Whose Constitutional and Statutory Rights The Districts Purport to Protect

State race-based districting — like all other state race-based decision-making — is narrowly tailored only if "[w]hatever 'remedy' the State imposes . . . [is] adequately tailored to the 'wrong' to which it is addressed." *Shaw v. Hunt*, 861 F. Supp. at 485 (Voorhees, J., dissenting).[60] For these race-based districts to be narrowly tailored, the districts as created must substantially include the particular minority voters whose constitutional and statutory rights they are designed to protect. Racially constructed legislative districts are narrowly tailored only if they " 'restore the [specific] victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' " *Missouri v. Jenkins*, 115 S. Ct. 2038, 2054 (1995) (citation and internal quotation omitted).

Here, even if Texas had a compelling governmental interest to create race-based districts in order to comply with the Voting Rights Act, Districts 18, 29, and 30 as drawn do not substantially

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[60] *See Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("*Milliken I*") ("the scope of the remedy is determined by the nature and extent of the constitutional violation") (citation omitted). *See also Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("*Milliken II*") ("[t]he remedy must . . . be related to 'the *condition* alleged to offend the Constitution . . . ' ") (citation omitted) (emphasis in original).

include the particular minority voters whose voting rights the districts purport to protect. Texas argues that CD 30 as drawn is narrowly tailored to preserving the voting rights of the compact African-American community in Dallas County. *See* Texas Brief at 38-39. Yet, District 30 as drawn does not substantially relate to the large African-American community in Dallas County. That community is located south and southeast of downtown Dallas.[61] District 30 as drawn excludes a significant percentage of the core Dallas County Black community, which was placed in CDs 5 and 24, respectively.[62] In addition, CD 30 as drawn includes thousands of scattered Blacks in the northern and northwestern portions of Dallas County, as well as Blacks living in Collin and Tarrant Counties.[63]

Due to then-Senator Johnson's preference for "performing" African-American voters, *see* Johnson Testimony, 12/12/91 Tr. at 234-35 & 248-49, J.A. 429-31 & 435-36, thousands of Blacks from the core Dallas County Black community were excluded from CD 30. *See* State Ex. 33, Map of Core and Segmented Portions of CD 30, J.A. 335, (demonstrating that 30% of the Blacks in CD 30 live outside the core African-American community in south Dallas). Thus, as the Lawson/Reyes Intervenors concede, the Blacks outside of the core Dallas County Black community were not included in CD 30 to remedy past voting rights violations they may have suffered. *See* Lawson/Reyes Brief at 14. Not only does CD 30 fail to substantially include the particular African-American voters whose voting rights the district purports to protect, the district was not even designed to include such voters. Similarly, Districts 18 and 29 do not substantially include the particular African-American and Hispanic voters in Harris County that they were designed to protect. *See*

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[61] *See* Map of Dallas County Black Population Distribution by VTD, Plan C657, PL. Ex. 34H2, J.A. 150.

[62] *See* Map of Texas Districts of the 103rd U.S. Congress Plan C657, Dallas County, PL. Ex. 34(B)(3), J.A. 146.

[63] *See* PL. Ex. 34H2, J.A. 150, and Map of Collin County Black and Hispanic Population Distribution by VTD, PL. Ex. 34H17, Plan C657, J.A. 153.

State Ex. 61A, map of Core and Segmented Portions of CD 18, J.A. 341; State Ex. 61B, map of Core and Segmented Portions of CD 29, J.A. 342. Thus, CDs 18, 29, and 30 are not narrowly tailored.

Under the Department of Justice's test for satisfying narrow tailoring, so long as the State does not draw more compact minority "opportunity" districts than necessary, it may essentially draw them wherever it wishes. Under this logic, if a compact African-American district could be drawn in South Dallas, but the State draws an African-American district in North Dallas or in Collin or Tarrant Counties instead in order to serve the interests of incumbents, the plan is narrowly tailored. The Department of Justice's approach rests on the "suspect" premise that "the rights of some minority voters under Section 2 may be traded off against the rights of other members of the same minority class." *DeGrandy*, 114 S. Ct. at 2661. This approach must be rejected.

The only circumstance under which a State is permitted to take race into account is to remedy the harms flowing from past racial discrimination. *Croson*, 488 U.S. at 493. These harms relate to particular individuals. The right not to be discriminated against in voting is a right that belongs to individuals, not racial groups. The harm done to an individual in South Dallas is not addressed by enhancing the voting strength of someone in North Dallas or in Collin or Tarrant Counties who happens to be the same color as the person aggrieved. Such a remedy is not narrowly tailored to the harm, and is based on a principle that this Court has plainly rejected. *See Shaw v. Reno*, 113 S. Ct. at 2827; *Miller*, 115 S. Ct. at 2486.

C. By Rejecting More Compact, Alternative Majority-Minority Districts, Texas Failed To Employ Narrowly Tailored Means In Drawing CDs 18, 29, And 30 Along Racial Lines.

There is overwhelming evidence that Texas could have drawn the same number of majority-minority and "opportunity" minority districts as it did in HB 1, with highly compact and

contiguous districts that respected existing political subdivisions and preserved cohesive neighborhood interests. The district court noted that faced with this evidence, Texas did not "seriously argue" at trial that "Districts 18, 29 and 30 are 'narrowly tailored' to fulfill the State's obligations under the Voting Rights Act and would thus withstand the strict scrutiny test. *Based on the evidence, this would have been nigh impossible.*" *Vera*, 861 F. Supp. at 1342 (emphasis added).

The court further noted that "[a]t least two proposed redistricting plans for Dallas — Senator Johnson's Plan C500 and Owens-Pate Plan 606 — and two for Houston — Owens-Pate Plan 606 and Dr. Weber's Plan 676 — included far more compact, contiguous majority-minority districts." *Vera*, 861 F. Supp. at 1342. In addition, "[m]any" state witnesses "acknowledged that majority-minority districts could have been created in Harris and Dallas counties with more respect for compactness, contiguity, geography, and neighborhood preservation." *Id.* (citing Johnson Deposition at 130-32, 142; Johnson Testimony, 6/28/94 Tr. at 128-29).[64]

Yet, the districts as drawn fail any measure of compactness, causing great harm to the electoral process. "[A] district is sufficiently geographically compact if it allows for effective representation . . . [A] district would not be sufficiently compact if . . . it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district." *Dillard v. Baldwin*

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[64] The Lawson/Reyes Intervenors erroneously contend that "this Court has held that different minority voters should not be combined to assess Voting Rights Act compliance unless political cohesion between the two groups is proved. Lawson/Reyes Brief on the Merits at 55 n.80 (citing *Growe*, 113 S.Ct. 1075 (1993)). This contention, however, is plainly incorrect. *See also LULAC*, 999 F.2d at 894 n.2 (Jones, J., concurring). This Court has never held that states are vulnerable under § 2 if they combine minority groups to form majority-minority districts. As is discussed above, rather than creating balkanized, single-race majority districts, Texas could have easily combined Blacks and Hispanics into two compact districts in Houston in which together they would have been overwhelming majorities. *See* pp. 13-14, *supra*.

County, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988). These bizarre districts destroy any "sense of community."

In light of the foregoing, the district court correctly concluded that Texas "ha[d] not carried its burden of production on the issue of narrow tailoring." *Vera*, 861 F. Supp. at 1342. Texas's refusal to implement these alternative districting plans is sufficient, *in and of itself*, to show that Texas failed to use narrowly tailored means in creating districts 18, 29, and 30. Given that the districts as drawn also make a mockery of traditional districting principles, Texas cannot show that it employed narrowly tailored means in drawing CDs 18, 29, and 30 along racial lines. *See Vera*, 861 F. Supp. at 1344 ("Where obvious alternatives to a racially offensive districting scheme exist, the bizarre districts are not narrowly tailored.").

CONCLUSION

For the reasons set forth above, Appellees urge the Court to affirm the judgment below.

Respectfully submitted,

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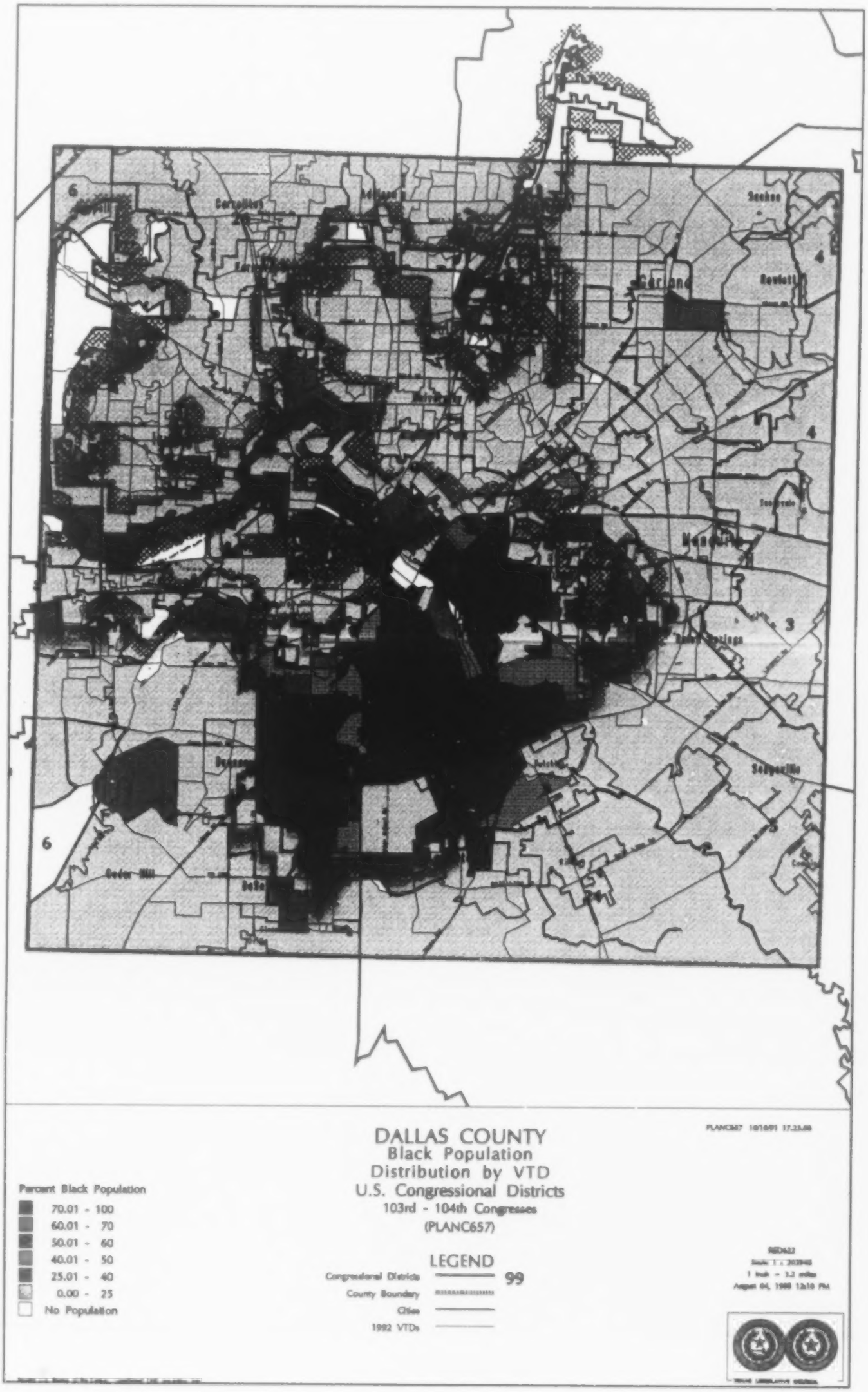
October 13, 1995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Ferris
Combine
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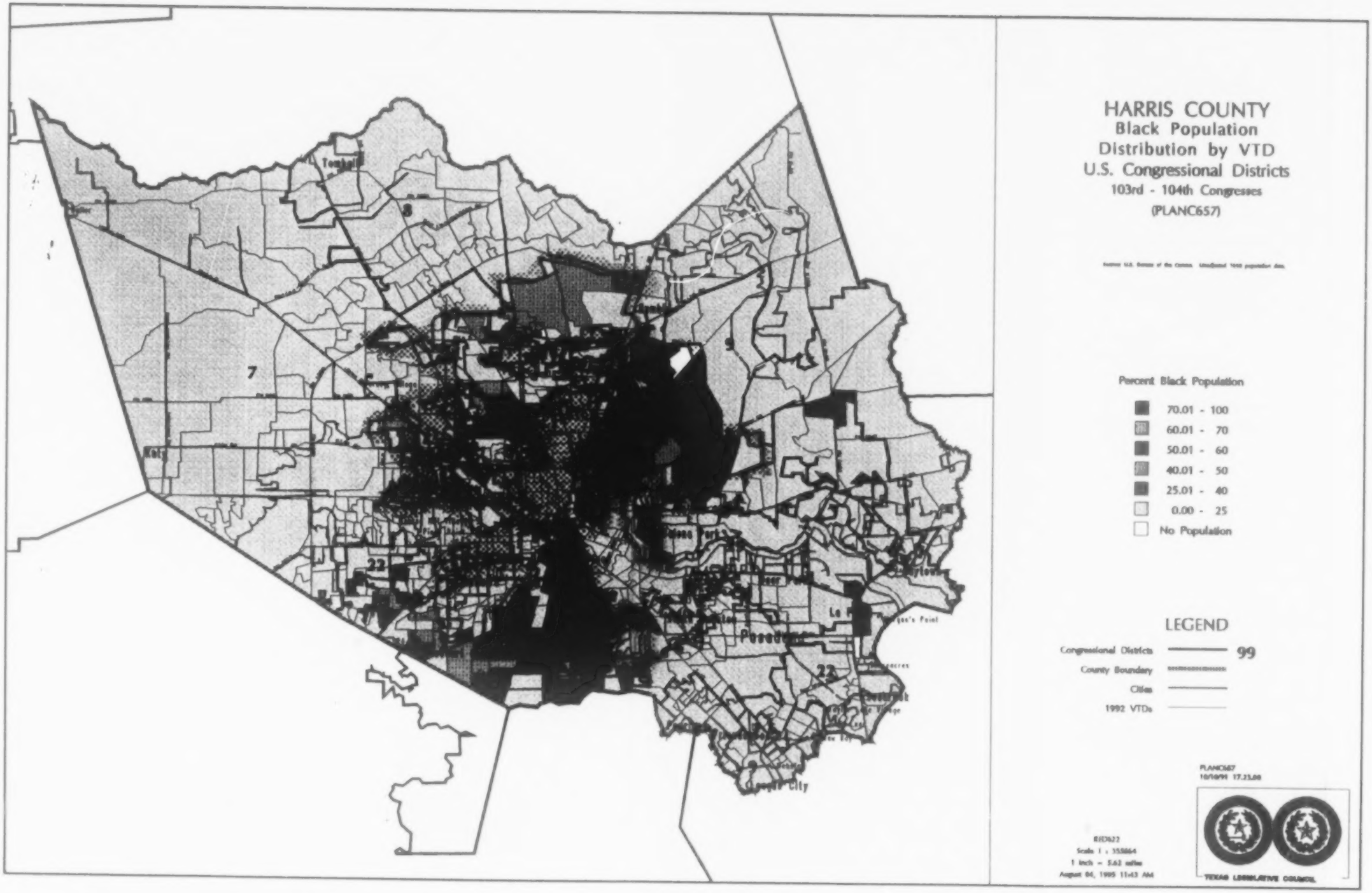
TEXAS LEGISLATIVE COUNCIL

Plaintiffs's Exhibit 34H8



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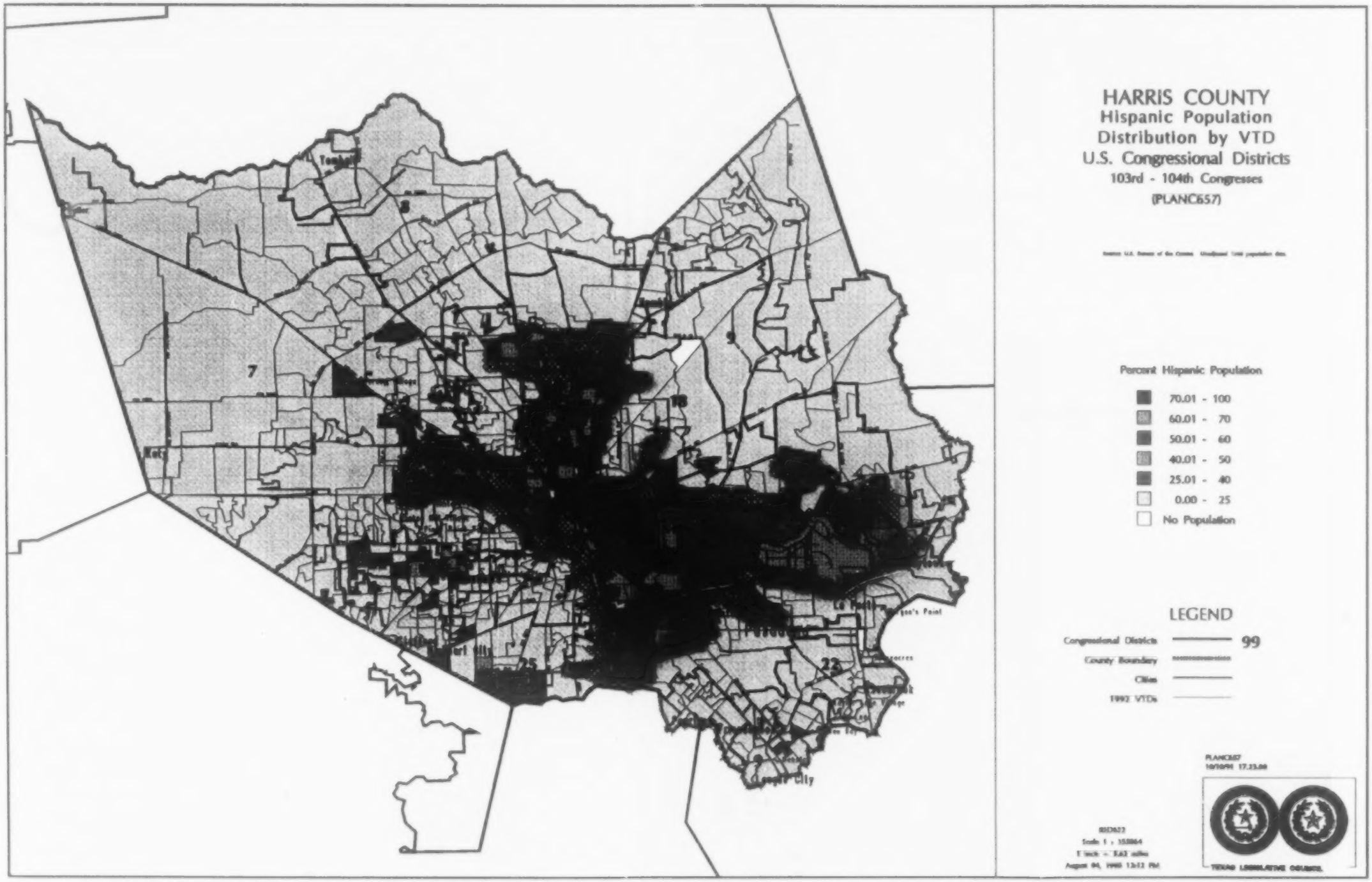

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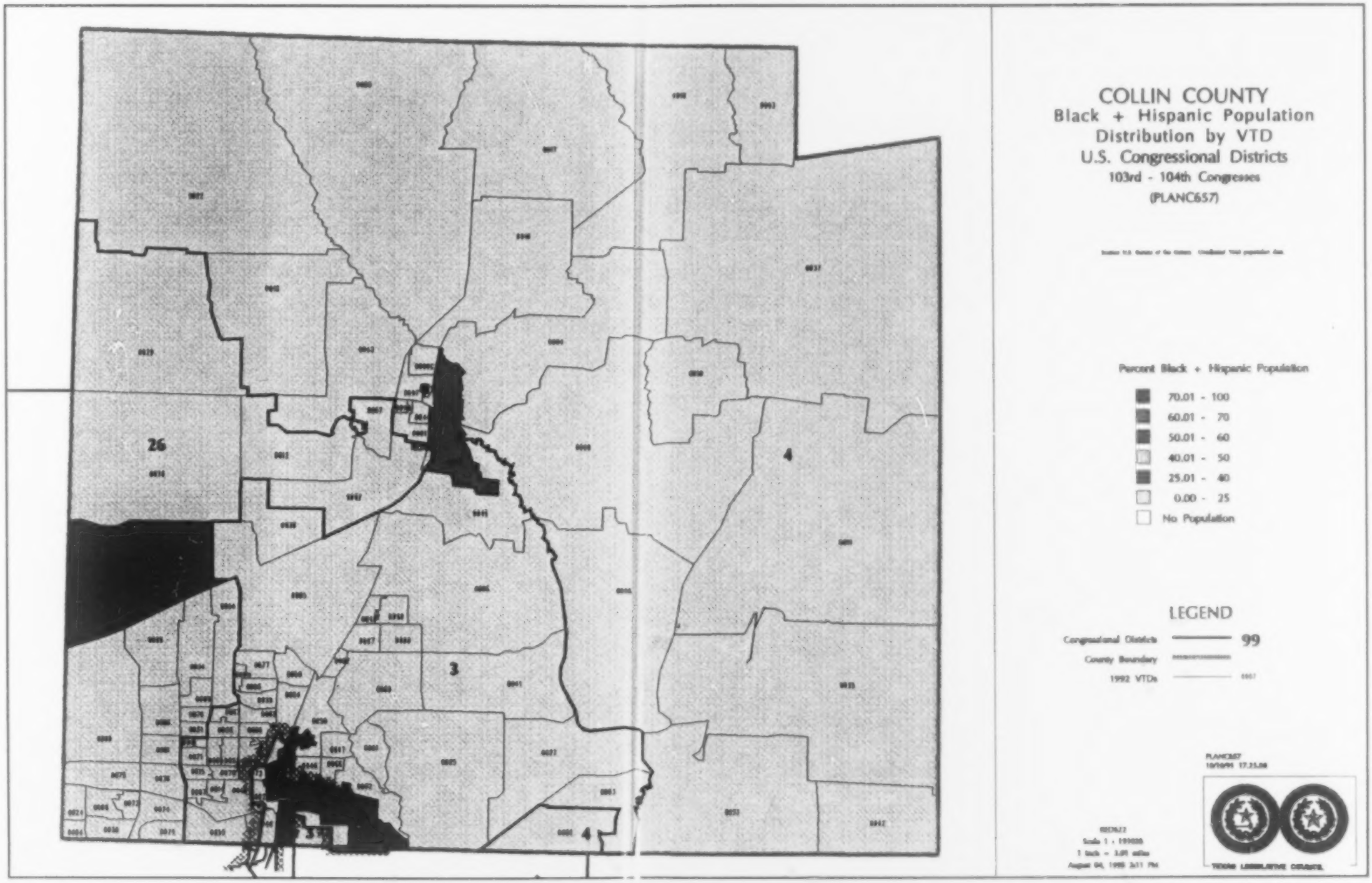
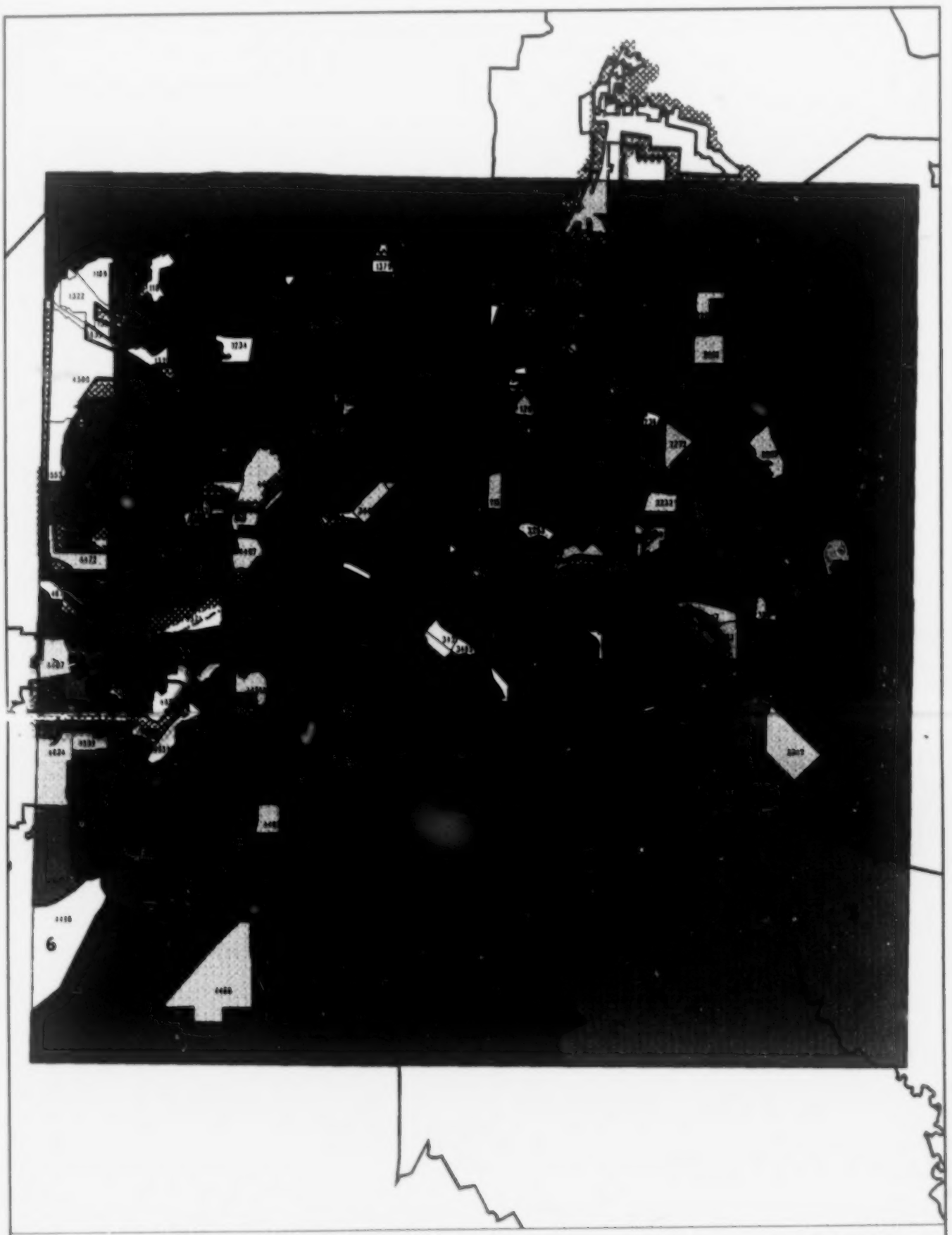


State's Exhibit 9A(1)



State's Exhibit 9A(2)

State's Exhibit 9B